TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1966 7

No. ~~789~~ 27

FEDERAL TRADE COMMISSION, PETITIONER

vs.

FRED MEYER, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 21, 1966
CERTIORARI GRANTED FEBRUARY 13, 1967

Supreme Court of the United States

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BEFORE FEDERAL TRADE COMMISSION

Docket No. 7492

IN THE MATTER OF

FRED MEYER, INC., a corporation, and FRED G. MEYER and EARL A. CHILES, individually and as officers of said corporation.

COMPLAINT—May 15, 1959

The Federal Trade Commission, having reason to believe that the respondents named above have violated and are now violating the provisions of Section 2(f) of the amended Clayton Act (15 U.S.C., Section 13), and Section 5 of the Federal Trade Commission Act (15 U.S.C., Section 45), and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint, stating its charges as follows:

Count I

Paragraph One: Fred Meyer, Inc. is a corporation organized, existing and doing business under the laws of the State of Oregon, with its principal office and place of business located at 721 Southwest Fourth Avenue, Portland, Oregon.

Respondents Fred G. Meyer and Earl A. Chiles are individuals and officers of the corporate respondent. These individual respondents maintain their offices and place of business at the same address as that of the corporate respondent. As officers of the corporate respondent, the individual respondents direct, manage and control the business activities of the corporate respondent, including the [fol. 4] purchasing policies referred to in this complaint.

Paragraph Two: Respondents are principally engaged in the purchasing, distribution and sale of retail merchandise, including food, drug and variety and a limited line of clothing.

Fred Meyer, Inc., owns and operates 13 retail stores all located within Portland, Oregon, and the vicinity.

Gross sales of corporate respondent for the year ending December 31, 1957, were in excess of $40,000,000.

Paragraph Three: The respondents are now, and for many years have been, purchasing in commerce from sellers engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act and the amended Clayton Act, numerous products and supplies for use, consumption and resale within the United States. In connection with such transactions, respondents are now and have been, in active competition with other corporations, partnerships, firms and individuals also engaged in the purchase for use, consumption and resale of products and supplies of like grade and quality from the same or competitive sellers. These sellers are located in the several States of the United States, and the respondents and such sellers cause the products and supplies so purchased in manner and method and for purposes as stated, to be shipped and transported among and between the several States of the United States, from the respective state or states of location of said sellers to the respective state of location of respondents.

[fol. 5] Paragraph Four: In the course and conduct of their business in commerce, respondents have adopted, followed and pursued purchasing policies and practices which were knowingly designed and intended to and did induce from such of the aforesaid commodity sellers as acceded, discriminatory prices, discounts, allowances, rebates and terms and conditions of sale, favorable to respondents in the commodity purchase transactions described.

For example, for a four-week period in September and October of each year, respondents sell to consumers, at the nominal price of ten cents each, books containing 72 coupons, each of which features an article of merchandise sold by respondents. By redeeming the coupon in conjunction with the purchase of a featured article of merchandise, the consumer is able to buy at a specially reduced price or to obtain the merchandise free. As an example of the magnitude of such promotions, there were approximately 138,700 coupon books sold by respondents in 1956

and a total of 898,573 coupons, more or less, redeemed by customers.

Suppliers of respondents are aggressively solicited by respondents' buyers to participate in this coupon book program by selling to respondents at specially reduced prices quantities of merchandise necessary to cover total expected redemption or by giving free merchandise, or otherwise. Further, some participating suppliers redeem the coupons featuring the respective merchandise at face or other value, resulting in a lowered net price to respondents.

Paragraph Five: The favorable discriminatory prices, discounts, rebates and terms and conditions of sale were [fol. 6] not granted by said sellers to respondents' competitors nor received by respondents' competitors in connection with the like or similar purchase transactions of commodities of like grade and quality so purchased for consumption, use or resale.

Each and all of the aforesaid discriminatory purchase transactions so negotiated and made tend to and do establish the acceding suppliers therein as preferred sources of supply over competitive sellers not so acceding, for the purchase for consumption, use or resale by said respondents of the commodities concerned and give the respondents price advantages over non-favored buyers as described in the purchase for consumption, use or resale of the same or similar commodities of like grade and quality.

Paragraph Six: When they knowingly induced or received the discriminatory net prices from their suppliers, as alleged, respondents knew or should have known that such discriminatory net prices were not being granted to competitors of respondents on goods of like grade and quality; that such net prices were not cost justified by savings to the suppliers in the cost of manufacture, distribution and sale; and that the net prices were not being granted by the suppliers in good faith to meet a competitive net price.

Paragraph Seven: The effect of each and all of the described discriminations in prices induced by respondents in each and all of the purchase transactions described made in the manner and method and for the purpose stated, and received in each and all of such transactions

by respondents, has been, and may be, to substantially [fol. 7] lessen competition in the lines of commerce in which the acceding sellers, said sellers' competitors, respondents, and respondents' competitors, as described, are engaged, on to injure, destroy or prevent competition with the acceding sellers and their competitors and respondents and their competitors.

Paragraph Eight: The aforegoing alleged acts and practices of respondents are in violation of Section 2(f) of said amended Clayton Act.

Count II

Paragraph Nine: Each of the allegations contained in Paragraphs One through Three hereof, are hereby realleged and made part of this Count as fully and with the same effect as though herein again set forth in full.

Paragraph Ten: In the course and conduct of their business in commerce, and particularly since 1955, respondents have knowingly induced and received from many of their suppliers payments, allowances, services and facilities granted to them or for their benefit, including money, goods or other things of value. These payments, allowances, services and facilities have been made, or contracted to be made, as compensation or in consideration for promotional activities furnished by or through respondents in connection with the sale or offering for sale of products sold to them by these suppliers. Such payments, allowances, services and facilities were not made available by these suppliers on proportionally equal terms to all other customers of such suppliers competing with respondents in the sale and distribution of such products.

For example, respondents publish annually a book of 72 coupons as hereinbefore described. Each coupon features [fol. 8] a product of one of respondents' suppliers. Merchandise buyers of respondents are instructed to and do solicit suppliers' participation in such coupon book promotion. The cost of participation to the buyer is a sum such as $350 cash for a page or coupon to be included in the book, plus reimbursement to respondents for redemption of such coupons, or the allowances to respond-

ents of a specially reduced price to offset the cost of the promotional activities involved in the use of such coupons, or free goods, services or facilities to respondents.

Further, respondents at times during the year feature other special promotions such as "gift days" or "thrift days" during which merchandise buyers of respondents solicit suppliers for cash payments, allowances, services and facilities, in return for which respondents agree to render special promotional services to each supplier.

Among and typical of the suppliers who participated in the promotional activities of respondents and made payments and supplied benefits to respondents during the promotional periods were:

Supplier	Address	Product
Tri-Valley Packing Association	San Francisco, California	Canned fruits
Burlington Industries, Inc.	Greensboro, N.C.	Hosiery

Paragraph Eleven: Many of respondents' suppliers, including particularly those listed in the above paragraph, did not offer or otherwise make available to all their customers competing with respondents in the sale and distri-
[fol. 9] bution of their products, any similar payments as compensation or consideration for advertising or other services and facilities, on terms proportionally equal to those granted respondents.

When such benefits, payments, goods, services and facilities were induced or received from the suppliers, as alleged, respondents knew or should have known that such payments, allowances, goods, services and facilities were not offered or otherwise made available on proportionally equal terms to other customers competing with respondents in the sale and distribution of products of like grade and quality of such suppliers.

Paragraph Twelve: In knowingly inducing or receiving such special payments, benefits, goods, services and facilities from suppliers which were not made available on proportionally equal terms to respondents' competitors, respondents have engaged in acts and practices which are to the prejudice and injury of the competitors of the re-

spondents and the public. Such acts and practices have the tendency and effect of obstructing, hindering, lessening and restraining competition in the purchasing, distribution and sale of food, drug, variety and clothing products. Such acts have the tendency to obstruct and restrain and have obstructed and restrained commerce in such products and accordingly, constitute unfair methods of competition and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act (15 U. S. C., Section 45).

Wherefore, The Premises Considered, the Federal Trade Commission on this 15th day of May, A. D., 1959, issues its complaint against said respondents.

[fol. 10] Notice

Notice is hereby given to each of the respondents hereinbefore named that the 14th day of July, A. D., 1959, at 10 o'clock is hereby fixed as the time and Portland, Oregon, as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. Such answer shall contain a concise statement of the facts constituting the ground of defense and a specific admission, denial or explanation of each fact alleged in the complaint or, if respondents are without kowledge thereof, a statement to that effect.

If respondents elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that respondents admit all material allegations to be true. Such an answer shall constitute a waiver of hearing as to facts so alleged, and an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding shall be issued by the hearing examiner. In such answer respond-

ents may, however, reserve the right to submit proposed findings and conclusions and the right to appeal under Section 3.22 of the Commission's Rules of Practice for [fol. 11] Adjudicative Proceedings.

If any respondent elects to negotiate a consent order, it shall be done in accordance with Section 3.25 of the Commission's Rules of Practice.

Failure to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize a hearing examiner without further notice to respondents to find the facts to be as alleged in the complaint, to conduct a hearing to determine the form of order, and, thereafter, to enter an initial decision containing such findings and order.

In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 15th day of May, 1959.

By the Commission.

/s/ ROBERT M. PARRISH
Secretary.

[fol. 12]

BEFORE FEDERAL TRADE COMMISSION

* * * *

ANSWER

Come now the respondents and for answer to the complaint heretofore filed before the Federal Trade Commission pursuant to the provisions of Section 2(f) of the amended Clayton Act (15 U. S. C., Section 13) and Section 5 of the Federal Trade Commission act (15 U. S. C., Section 45), a copy of which complaint was mailed by registered mail addressed to each of the respondents at Portland, Oregon, on May 19, 1959, and received by them at Portland, Oregon, on May 21, 1959, and admit, deny and allege as follows:

Count I

Paragraph One: Answering Paragraph One, respondents admit that Fred Meyer, Inc., is a corporation organized, existing and doing business under the laws of the State of Oregon with its principal office and place of business located at 721 S. W. Fourth Avenue, Portland, Oregon. Respondents further admit that Fred G. Meyer and Earle A. Chiles are individuals and officers of said corporation and that they maintain their offices and place of business at the same address as that of the corporate respondent. Earle A. Chiles is the President of said corporation and Fred G. Meyer is the Chairman of the Board of said corporation and both of said individual defendants are directors of said corporation except as said individual defendants discharge their duties as such officers and directors, respondents deny every other matter and thing set forth in said paragraph.

[fol. 13] Paragraph Two: Answering Paragraph Two, respondents admit that Fred Meyer, Inc., is principally engaged in the purchasing, distribution and sale of retail merchandise including food, drugs and variety merchandise and a limited line of clothing and that said corporate respondent owns and operates thirteen (13) retail stores within Portland, Oregon, and vicinity and that the gross sales of said respondent corporation for the year ending December 31, 1957, were in excess of $40,000,000.

Paragraph Three: Answering Paragraph Three, respondents admit that Fred Meyer, Inc., the corporate respondent, has purchased merchandise from suppliers throughout the United States for resale principally within the State of Oregon and that such sellers or suppliers are located in the several states of the United States and that such merchandise so purchased is shipped to respondent at Portland, Oregon, from the respective states of the location of said sellers and suppliers, but respondents deny every other matter and thing set forth in said Paragraph Three.

Paragraph Four: Respondents categorically deny every matter and thing set forth in Paragraph Four of said complaint and the whole thereof except that respondents admit that the corporate respondent did sell to consumers

and its customers coupon books at a price of Ten Cents each which feature said articles of merchandise sold by corporate respondent which said coupons enable the purchaser and customer to buy merchandise listed therein at specially reduced prices or to obtain the same free and respondents admit that approximately 138,000 coupon [fol. 14] books were sold by the corporate respondent in 1956 and that a total of 898,573 coupons, more or less, were redeemed by customers.

Paragraph Five: Answering Paragraph Five, respondents categorically deny the same and every matter and thing therein set forth.

Paragraph Six: Answering Paragraph Six, respondents categorically deny the same and every matter and thing therein contained.

Paragraph Seven: Answering Paragraph Seven, respondents categorically deny the same and every matter and thing therein contained.

Paragraph Eight: Answering Paragraph Eight, respondents categorically deny the same and every matter and thing therein contained.

Count II

Paragraph Nine: Answering Paragraph Nine of Count II, respondents categorically deny the same except as hereinabove admitted in respondents' answer to Paragraphs One to Eight inclusive contained in Count I.

Paragraph Ten: Answering Paragraph Ten, respondents categorically deny the same and every matter and thing therein contained except that respondents admit that from time to time since 1955 and many years prior thereto, the corporate respondent had published annually coupon books which feature products sold by the corporate respondent, and further admit that the corporate respondent's suppliers are solicited for participation in such coupon book promotion, and respondents further admit [fol. 15] that from time to time the corporate respondent conducts other special promotions such as "gift days" or "thrift days" and that suppliers are solicited for promotional allowances in return for which respondents agree to and do furnish special advertising and promotional services to suppliers participating.

Paragraph Eleven: Answering Paragraph Eleven, respondents deny the same and every matter and thing therein contained.

Paragraph Twelve: Answering Paragraph Twelve, respondents categorically deny the same and every matter and thing therein contained.

For a first further and separate answer and defense pursuant to Federal Trade Commission Rules of Practice, your respondents allege:

Paragraph One: That Fred Meyer, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Oregon having its principal office and place of business located at 721 Southwest Fourth Avenue, Portland, Multnomah County, Oregon.

Respondents Earle A. Chiles and Fred G. Meyer are President and Chairman of the Board and directors of the corporate respondent, Fred Meyer, Inc.

Paragraph Two: Fred Meyer, Inc., is engaged principally in the purchasing, distribution and sale at retail of food and drugs and variety merchandise and limited lines of clothing and owns and operates wholly within the State of Oregon and within the vicinity of Portland, Oregon, thirteen (13) retail stores.

[fol. 16] Paragraph Three: Fred Meyer, Inc., employs various merchandisers and buyers who purchase merchandise from suppliers within the State of Oregon and without the State of Oregon and throughout the several states of the United States sold by said corporate respondent and that such merchandise is purchased on the most favorable lawful terms possible.

Paragraph Four: That from time to time Fred Meyer, Inc., conducts promotions in the sale of its merchandise at retail as for example, coupon books, "thrift day" promotions, and the like.

Paragraph Five: That in the course of the purchase of merchandise for resale, it has been a trade practice for many years in the area of Portland, Oregon, and throughout the United States for suppliers to make "advertising allowances" and to give trade discounts relating to the volume and conditions of purchase and to the grade and quality of merchandise purchased.

Paragraph Six: That the corporate respondent and its officers and employees generally have no knowledge of the extent of promotional allowances and trade discounts offered or given to its competitors.

Paragraph Seven: That the conduct of your corporate respondent in purchasing merchandise for lawful and competitive prices and distributing the same to the public at the lowest price consistent with sound merchandising practice encourages competition among competitors within the State of Oregon as well as suppliers of merchandise, and your respondents categorically deny that they have knowingly induced any supplier of merchandise [fol. 17] to the corporate respondent to give to said corporate respondent advertising allowances, promotional allowances or trade discounts which were not offered or given to other customers of said suppliers purchasing under like conditions and similar quantities of merchandise and which were not justified under all the circumstances.

Wherefore, having fully answered the complaint, respondents pray that a hearing be held before an examiner of the Federal Trade Commission to hear the charges as set forth in the complaint and the answer of the respondents and the evidence produced by the respondents and that the hearing examiner make proper findings and conclusions of fact and of law with respect thereto and dismiss the complaint filed herein.

/s/ GEORGE W. MEAD
Attorney for Respondents
1211 Public Service Building
Portland, Oregon
Telephone: CApitol 8-7686

Duly Verified

Received June 15, 1959

[fol. 18]

BEFORE FEDERAL TRADE COMMISSION

Docket No. 7492

IN THE MATTER OF

FRED MEYER, INC., a corporation, and FRED G. MEYER and EARLE A. CHILES,[1] individually and as officers of said corporation.

INITIAL DECISION—January 23, 1962

Edgar A. Buttle, Hearing Examiner
Jerome Garfinkel, for the Commission
George W. Mead, Portland, Oregon,
for the Respondents

On May 15, 1959, the Federal Trade Commission issued its complaint in this proceeding (Docket No. 7492) against the respondents charging them with violation of section 2(f) of the amended Clayton Act (15 U.S.C., section 13), and section 5 of the Federal Trade Commission Act (15 U.S.C., section 45).

Theory of Commission's Case

The crux of the 2(f) charges is that respondents unlawfully engaged in commerce by knowingly inducing or receiving a discrimination in price prohibited by section 2(a) of the Clayton Act, as amended. The crux of the charges under section 5 of the Federal Trade Commission Act is that similarly and otherwise respondents have knowingly induced and received from many of their sup- [fol. 19] pliers payments, allowances, services and facilities granted to them for their benefit, including money, goods, or other things of value, which practices of the respondents constitute unfair methods of competition.

In connection with the 2(f) charges, Paragraph Four, Count I of the complaint, states as follows:

"In the course and conduct of their business in commerce, respondents have adopted, followed and pursued

[1] Erroneously referred to in the complaint as Earl A. Chiles.

purchasing policies and practices which were knowingly designed and intended to and did induce from such of the aforesaid commodity sellers as acceded, discriminatory prices, discounts, allowances, rebates and terms and conditions of sale, favorable to respondents in the commodity purchase transactions described."

and Paragraph Ten, Count II thereof in charging respondents under section 5 of the Federal Trade Commission Act with inducing a violation of section 2(d) of the Clayton Act, states as follows:

"In the course and conduct of their business in commerce, and particularly since 1955, respondents have knowingly induced and received from many of their suppliers payments, allowances, services and facilities granted to them or for their benefit, including money, goods or other things of value. These payments, allowances, services and facilities have been made, or contracted to be made, as compensation or in consideration for promotional activities furnished by or through respondents in connection with the sale or offering for sale of products sold to them by these suppliers. Such payments, allowances, services and facilities were not made available by [fol. 20] these suppliers on proportionally equal terms to all other customers of such suppliers competing with respondents in the sale and distribution of such products."

The concept enunciated by the section 5 charges of the complaint appears to be sustained by the United States Supreme Court in Federal Trade Commission v. Motion Picture Advertising Service Co., Inc., 344 U.S. 392 (1953). The court in a section 5 proceeding involving exclusive dealing arrangements concludes that the "unfair methods of competition," which are condemned by section 5(a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act, Federal Trade Commission v. Keppel & Bro., Inc., 291 U.S. 304, and that Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business. It has also been indicated by the Supreme Court that the Federal Trade Commission Act was designed to supplement and bolster the Clayton Act and similar acts (see Federal

Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441, 453.) This also includes stopping in their incipiency acts and practices which, when full blown, would violate those Acts (see Fashion Guild v. Federal Trade Commission, 312 U.S. 457, 463, 466), as well as to condemn as "unfair methods of competition" existing violations of them (see Federal Trade Commission v. Cement Institute, et al., 333 U.S. 683, 691).

Since section 2(d) of the Clayton Act is a seller liability section, inducement of a seller to violate section 2(d) [fol. 21] emanating from a purchaser would, if any violation exists, come within the purview of section 5 of the Federal Trade Commission Act since this encompasses violations otherwise not provided for, as suggested by the cases heretofore cited. Thus, under this complaint, counsel in support of the complaint must first establish that the payments received by the respondents were in violation of section 2(d), of the Clayton Act, namely:

(1) That the suppliers were engaged in commerce;
(2) That payments for promotional services or facilities were made by the suppliers to respondents;
(3) That the services or facilities furnished by respondents were in connection with the resale of the supplier's products; and
(4) That these payments were not made available
(5) to all other customers of the suppliers competing with respondents
(6) on proportionally equal terms.

If it is established that such payments were in violation of section 2(d), then counsel in support of the complaint must further prove that "respondents knew or should have known" of the illegality charged.[2]

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[2] Section 2(f) of the Clayton Act, also under consideration, specifically provides: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." It would appear, therefore, that in order to establish a 2(f) charge under the Clayton Act there must be prerequisite proof of a 2(a) violation by the respondents' suppliers, and that respondents knew or should have known of the illegality charged. Thus, if a re-

[fol. 22] In a related case, i.e., Tri-Valley Packing Association, FTC Docket Nos. 7225 and 7496, the undersigned hearing examiner, referring to Tri-Valley, held that it had granted discriminatory price allowances to and had participated in the periodical promotional plans of Fred Meyer, Inc., of Portland, Oregon. Although counsel for respondents argued that the tracing of respondents' products to particular retail outlets is required in order to prove the requisite competition under section 2 (a) of the amended Clayton Act, the hearing examiner held otherwise. At page 19 of the initial decision, it is stated as follows:

"Respondent further contends that there is no evidence in the record showing respondent sold its products to some of its wholesale customers at higher prices than it sold its products of like grade and quality to other wholesale customers who were competitively engaged in the resale of said products. To the contrary, the evidence establishes that this position is without merit. As expressed by counsel supporting the complaint, the case in chief proceeded on the theory that if A, B, and C owned, operated or serviced retail grocery stores located in the same trade area of distribution, such as a metropolitan area, and goods of like grade and quality were purchased by A, B, and C and distributed to those retail grocery stores to be [fol. 23] purchased simultaneously by consumers in the same trade area, then A, B, and C are in competition in the distribution and sale of products. (See F.T.C. v. Fruitvale, Docket No. 5989, 1956.)"

The foregoing conclusion was premised upon the hearing examiner's view that there was a reasonable probability, unrefuted by the respondents, that the retail outlets located in the various trade areas owned and/or operated by favored and unfavored purchasers as well as by customers of unfavored wholesaler purchasers, contemporaneously received respondents' (i.e., Tri-Valley) canned

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spondent is being charged with inducing a supplier to violate section 2(a) or section 2(d) of the Clayton Act, obviously, it must be established that the supplier has violated either of these acts as a prerequisite to establishing inducement to do so by a customer.

food products of like grade and quality on which price concessions were granted to the favored purchasers, including Fred Meyer, Inc. In deciding the within case, Docket No. 7492, the hearing examiner takes cognizance of his findings of fact and conclusions in the Tri-Valley Case, Docket Nos. 7225 and 7496, to the extent that the facts and issues are identical to those established by the evidence in the within case, Docket No. 7492,[3] since respondent herein was a customer of Tri-Valley.

[fol. 24] Respondents' Position

The theory of respondents' defense is summarized in their brief as follows:

"The pleadings raise the important question as to whether or not section 5 of the Federal Trade Commission Act can be invoked in conjunction with the application of

[3] See Lifetime Cutlery Corp., et al., Docket No. 7292, in which the hearing examiner in an order pursuant to which official notice is taken states as follows:

"Official notice . . . allows many facts to be recognized and adopted as true which are beyond the realm of common knowledge, and may well be disputed. Moreover, official notice comes to us not from the common law, but by sanction of the Administrative Procedure Act, and is specifically intended to meet the complex and widely-varying needs of the administrative agencies. Official notice is the act of a Governmental agency, or its hearing official, in recognizing facts which have been proved to be true in precedent proceedings, as presumptively true in a pending proceeding. The use of official notice is desirable because it avoids the necessary of re-proving that which had already been shown to be true and brings to bear upon the issue all the accumulated knowledge and expertise relating thereto. No undue abrogation of traditional rights results from the taking of official notice, because opportunity is given for the affected party to show the contrary of the facts officially noticed."

In the Fred Meyer case there can be no prejudice in taking official notice since the evidentiary facts relating to the trade areas within which respondent and its competitors received similar products of like grade and quality from Tri-Valley have been thoroughly developed herein. The evidence established in the Tri-Valley case, however, is corroborative of the evidence in the within case, (i.e., Fred Meyer case) and the legal concept applied in tracing distribution, the same.

section 2(f) of the Clayton Act to activities which are described in section 2(d) of the Act but which Congress has intentionally excluded from the scope of section 2(f) as applicable to buyers.

While we are aware of the decision of the Federal Trade Commission in Grand Union, Docket No. 6973, and Giant Food, Inc., Docket No. 6459, it would appear that no appellate court has reviewed this problem and that the most recent pronouncement on the subject is still the old case of Automatic Canteen Co.

[fol. 25] 1. In order to prove a violation under section 2(f) of the amended Clayton Act, counsel supporting the complaint must first prove that the suppliers of the alleged favored buyer violated section 2(a) of the amended Clayton Act, and that none of the affirmative defenses available under said section 2(a) or section 2(b) of the Clayton Act are available to the suppliers. This, counsel supporting the complaint has failed to do.

2. Even assuming arguendo, counsel supporting the complaint has proved violation of section 2(a) of the amended Clayton Act by respondents' suppliers, counsel has failed to prove respondents' alleged violation of section 2(f) of the amended Clayton Act since he has failed to prove that respondents knew or should have known of such violation.

3. Section 5 of the Federal Trade Commission Act cannot be used to extend the prohibition of section 2(f) of the amended Clayton Act to conduct specifically exempt by Congress from section 2(f).

4. Counsel supporting the complaint has failed to establish from the evidence that respondents Fred Meyer, Inc., suppliers have in fact violated section 2(d) of the amended Clayton Act.

5. Even assuming arguendo that respondents Fred Meyer, Inc. suppliers had in fact violated section 2(d) of the amended Clayton Act, there is no substantial evidence that respondents or any of them knew or should have known that respondents Fred Meyer, Inc. was receiving promotional allowances or benefits not offered or made available by its suppliers on proportionally equal [fol. 26] terms to its competitors in the same trade area.

6. Counsel supporting the complaint has failed to prove a prima facie case of violation of section 5 of the Federal Trade Commission Act because he has failed to show that there is a reasonable possibility that the effect of the discounts and promotional allowance 'may be' substantially to lessen competition or to injure, destroy, or prevent competition."

Proposed findings of fact and conclusions of law were filed by counsel for both sides. The hearing examiner has carefully reviewed and considered same. Proposed findings and conclusions which are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

Upon the entire record in the case, the hearing examiner makes the following:

Findings of Fact

1. Fred Meyer, Inc. is a corporation organized, existing and doing business under the laws of the State of Oregon, with its principal office and place of business located at 721 Southwest Fourth Avenue, Portland, Oregon.

2. Respondents Fred G. Meyer and Earle A. Chiles are individuals and officers of the corporate respondent. These individual respondents maintain an office and place of business at the same address as that of the corporate respondent.

3. As officers of the corporate respondent, the individual respondents direct, manage and control the busi- [fol. 27] ness activities of the corporate respondent, including the purchasing policies referred to in the instant complaint.

4. Respondents are principally engage in the purchasing, distribution and sale of retail merchandise, including food, drugs and variety items, and a limited line of clothing.

5. Fred Meyer, Inc. owns and operates thirteen retail stores, all located within Portland, Oregon, and the immediate vicinity.

6. Gross sales of corporate respondent for the year ending December 31, 1957, were in excess of $40,000,000.

7. The respondents are now and for many years have been purchasing in commerce from sellers engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, and the amended Clayton Act, numerous products and supplies for use, consumption and resale within the United States.

8. In the course and conduct of their business in commerce, respondents have adopted and made use of coupon book programs as a means of reducing the prices and/or costs of goods purchased by respondents from suppliers, as well as a means of promoting products purchased from said suppliers.

9. In the course and conduct of its business in commerce, respondents induced and/or received discriminatory price concessions, discounts and rebates from various suppliers in connection with the purchase of products from said suppliers.

[fol. 28] 10. The price concessions, discounts and rebates which Tri-Valley Packing, Idaho Canning, Cannon Mills and Burlington Industries granted to respondents as a result of the latter's inducements and solicitations were neither granted, nor offered to other purchasers of said suppliers who competed with, or whose customers competed with, respondents in the sale and distribution of products of like grade and quality.

11. The evidence sustains a finding that the probable effect of the discriminatory price concessions granted respondents by Tri-Valley Packing, Idaho Canning, Cannon Mills and Burlington Industries may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondents and unfavored purchasers were engaged, or tend to injure, destroy or prevent competition with respondents.

12. When respondents induced or received the discriminatory net prices from Tri-Valley Packing, Idaho Canning, Cannon Mills, and Burlington Industries, they knew or should have known that such discriminatory net prices were not granted to competitors of respondents on goods of like grade and quality, and that such net prices could not be justified by savings to the aforesaid suppliers in cost of manufacture, distribution and sale.

13. Respondents have induced and received from various suppliers discriminatory payments or allowances in connection with the furnishing of services and facilities.
[fol. 29] 14. Respondents knew, or should have known, that the promotional or advertising payments or allowances they received from the aforesaid suppliers were not offered to all other customers competing with respondents in the distribution of the aforesaid suppliers' products.

Evidence and Applicable Law Upon Which Findings and Conclusions Are Premised

1. Respondents' Coupon Program

Since the mid 1930's, Fred Meyer, Inc. has been conducting an annual coupon book promotion. For a four-week period in September and October of each year, Fred Meyer, Inc. publishes and sells to consumers at the nominal price of ten cents each, books containing approximately seventy-two coupons, each one of which features an article of merchandise sold by Fred Meyer. Inc. By redeeming the coupon in conjunction with the purchase of a featured article of merchandise, the consumer is able to buy at a specially reduced price. There were 138,700 coupon books sold by Fred Meyer, Inc., in 1956, and a total of 898,573 coupons were redeemed by customers that same year.

Annually, suppliers of Fred Meyer, Inc. have agreed to participate in corporate respondent's book programs by selling said respondent at specially reduced prices a quantity of merchandise necessary to cover expected redemption, or by giving free merchandise, and/or by paying respondent a fee of $350.

As part of the consideration for the suppliers' participation in the coupon book programs, Fred Meyer, Inc., agreed to promote and feature the merchandise of such [fol. 30] participating suppliers during the coupon book programs.

2. Respondents' Inducement of Their Suppliers to Participate in Coupon Program

Respondents, it appears, solicited suppliers to participate in respondents' coupon programs. On this point, Mr.

Earle A. Chiles, president of the corporate respondent, testified as follows:

* * * *

Q. Now, when was it initiated in 1957?

A. Initiated? I presume you mean, when were the first contracts made or perhaps talk about it?

Q. Yes.

A. We start it the first of the year.

Q. Who starts it the first of the year?

A. The different buyers start contracting suppliers for participation in the coupon book promotion.

Q. Is this part of their duty as a buyer?

A. Yes.

Q. And how are the suppliers notified?

A. Suppliers are notified verbally when their representatives come into our office. We may have buyers go on buying trips and/or trips for the purpose of buying merchandise. As a part of their duty, they may contact any supplier on participation in the coupon book.

Q. Do you send out any form letters to the suppliers?

A. There are form letters sent out at different times.

* * * *

[fol. 31] The evidence also discloses that respondents' coupon programs were adopted to serve two separate and distict functions. One function of such programs was to provide respondents with a method wherein they could receive merchandise from suppliers at reduced prices, thereby enabling them to resell such merchandise to the public at reduced prices as a means of obtaining a greater share of the consumers "pocketbook." The second function of the coupon programs was to enable respondents, by providing services and facilities to suppliers, to obtain payments or allowances from suppliers as a means of defraying the cost of respondents' advertising campaigns in connection with goods purchased from said suppliers.

The evidence discloses that the costs to respondents for publishing and distributing the coupon books in 1956 amounted to $23,318. In 1957, the costs amounted to $23,406. Included in these costs were newspaper advertising, art work, printing books, radio spots, printed signs, handmade signs, and other costs. Under respondents'

coupon programs, a supplier whose product was illustrated on a particular coupon page agreed to compensate respondents, whether it be in cash, price reductions, price rebates, price discounts, or free goods, in an amount not less than $350. Since there were seventy-two coupon pages in each coupon book, respondents received from the suppliers a minimum of $25,200 for publication and distribution of the coupon books. In addition, respondents received in revenue from the sale of such books to the public $13,870 in 1956, and $12,127 in 1957.

[fol. 32] Thus, by compensating respondents in benefits worth not less than $350 a page as consideration for illustrating their products in the coupon books, the various suppliers not only paid for the entire cost of the publication and distribution of coupon books, but enabled respondents to make profits on the sale of such books in amounts exceeding $12,000 for each of the years 1956 and 1957.

The evidence further indicates that in addition to granting respondents $350 worth of benefits, thereby contributing to the entire cost of the coupon book programs, some suppliers granted respondents price reductions, price discounts, price rebates, or free goods substantially in excess of the $350 figure. Furthermore, the evidence discloses that no additional services or facilities were furnished by respondents for the additional benefits received. The price discounts, price reductions, price rebates on free goods in excess of $350 received by respondents varied in direct proportion to the volume or dollar amount of goods purchased and sold by respondent during the coupon book programs. These concessions were tantamount to subsidizing respondents' business of selling goods to the consumer at reduced prices.

As exemplified by the following transaction, the proof establishes respondents, through their coupon programs, were able to purchase and receive goods at reduced prices and that the success or failure of said programs depended on this ability to obtain such concessions from suppliers.

[fol. 33]

a. Tri-Valley Packing Association Transaction

A coupon page in the 1957 Fred Meyer, Inc., coupon book featured three number 2½ size cans of My-T-Fine choice, heavy syrup, yellow cling sliced or halved peaches for the regular price of two cans. The supplier, Tri-Valley Packing Association, agreed to participate in the 1957 coupon program to the extent of paying said corporate respondent $350 toward the printing and distribution of the coupon book and, further, agreeing to reimburse corporate respondent for each coupon redeemed at the September, 1957 price of such a can of yellow cling peaches. Twenty thousand seven hundred and fifty (20,750) coupons were redeemed by Tri-Valley Packing for a total participation amounting to $5,164., (of which $4,814 were price concessions), and which amount was paid to corporate respondent in free merchandise.

The price differential granted to Fred Meyer, Inc., during the coupon program amounted to about 33%, since a free can of peaches was given by Tri-Valley Packing for every two sold by said respondent during the $957 coupon book program.

b. Idaho Canning Company Transaction

A coupon page in the 1957 Fred Meyer, Inc., coupon book featured three cans of My-T-Fine whole kernel or cream style corn, number 303 can, for the price of two. The supplier, Idaho Canning Company of Payette, Idaho, participated by paying $350 toward the printing and distributing of coupon books, and 12.1 cents per each coupon redeemed. The total participation by Idaho Canning amounted to $2,935.41.

[fol. 34] This transaction, as in the Tri-Valley Association transaction, amounts to a price differential of approximately 33% in favor of Fred Meyer, Inc., in that one can of corn was given by Idaho Canning Company for every two sold by Fred Meyer, Inc., during the 1957 coupon book program.

c. Cannon Mills Transaction

A coupon page in the 1956 Fred Meyer, Inc. coupon book features seven Cannon fingertip towels for $1.00. The supplier, Cannon Mills company, agreed to participate in this coupon book program by selling such towels to respondents at $1.55 per dozen, although the regular price at the time was $1.65 per dozen. The total price concessions Cannon Mills granted to respondents in connection with the 1956 program amounted to $750, thereby exceeding the cost of a coupon page by $400.

d. Burlington Industries, Inc. Transaction

A coupon page in the 1957 coupon book featured Rose Dawn Nylons at reduced prices (98 cents a pair down to 79 cents, or 3 pair for $2.25). The supplier, Burlington Industries, Inc., agreed to participate in this coupon book program by granting to respondents price concessions amounting to 50 cents or 94 cents per dozen on respondents' purchases of hosiery illustrated in the coupon book. The total amount of these price concessions exceeded $1,700. It also appears the price concessions granted to respondents exceeded the cost of the coupon page by approximately $1,350.

Under a 1958 coupon program, Burlington Industries granted respondents price concessions amounting to 75 [fol. 35] cents per dozen, with the total amount of the concessions, dollar-wise, exceeding $1,800. In 1958, respondents' receipt of price concessions exceeded the cost of the coupon page by approximately $1,450.

3. Failure of Respondents' Suppliers to Grant Price Advantages to Its Customers Other Than Respondents

The evidence discloses that upon a supplier's agreement to participate in a coupon program of respondents, the supplier could not, while respondents' program was in effect, submit similar offers of coupon participation to respondents' competitors.

At about the same time that Fred Meyer, Inc. purchased such canned peaches from Tri-Valley Packing Association for use in the 1957 coupon book program, Tri-

Valley Packing Association also sold canned peaches of like grade and quality to Hudson House, Inc., a wholesaler and retailer of grocery products. The evidence discloses that Hudson House redistributed these canned peaches of like grade and quality to various retailers located in the Portland trading area who competed with respondents. During the 1957 period, respondents received $4,814 in price concessions from Tri-Valley Packing which were not granted to Hudson House.

In 1957, Fred Meyer, Inc., purchased from Idaho Canning substantial quantities of whole kernel or cream style corn to meet the terms of its coupon programs. At about the same time, Idaho Canning sold corn of like grade and quality to Hudson House, Inc. (previously discussed), and to Wadhams & Company, a wholesale grocery firm of [fol. 36] Portland, Oregon. Hudson House and Wadhams resold and redistributed these canned corn products to retailers who were in competition with Fred Meyer, Inc. Idaho Canning granted Fred Meyer, Inc., $2,935 in price concessions in connection with the Fred Meyer coupon program, and such concessions were not granted to Hudson House or Wadhams.

During the time that Cannon Mills sold Cannon fingertip towels to Fred Meyer, Inc., at $1.55 per dozen, in accordance with the terms of the 1956 coupon program, said supplier sold this same towel (of like grade and quality) to Roberts Brothers, a department store located three blocks from the closest Fred Meyer store, at $1.65 per dozen. In this connection, Mr. Clarence E. Miller, divisional manager of Robert Brothers, testified that his department store competed with Fred Meyer, Inc., in the resale of the aforesaid towels. As a result of being able to purchase fingertip towels at $1.55 per dozen, respondents obtained a competitive price advantage of 10 cents per dozen, with the total amount of the concessions approximating $750, of which $400 were outright price discounts, and $350 were advertising payments in connection with the cost of a coupon page.

At the same time that Fred Meyer, Inc. purchased "Rose Dawn" nylons from Burlington, Industries, for the 1957 and 1958 coupon programs, Lipman, Wolfe & Company, a department store, also purchased from the same

supplier stockings of like grade and quality under its private brand for resale to consumers in the Portland trade area in competition with Fred Meyer, Inc. Furthermore, the evidence discloses that Lipman, Wolfe & Company [fol. 37] did not receive from Burlington Industries, the discounts that were granted to Fred Meyer, Inc. As a result of inducements, respondents have been able to obtain preferential price treatment over its competitor, Lipman, Wolfe & Company, in amounts exceeding $1,350 in 1957, and $1,450 in 1958.

Impressive evidence that respondents compete with every other retailer located in the Portland, Oregon, trading area, in the resale of similar products may be found in a brochure respondents use when contacting suppliers. Some of the statements included therein are as follows:

"Fred Meyer Town's Trading Area Sells 75% of Oregon's Population."

"Shopping Centers on All the Main Crossroads."

"There's one in every neighborhood."

"In Fred Meyer Town Portland, Oregon We've Got 52,000,000 Sales Annually."

4. Reasonably Probable Effect of Price Advantages Received by Respondents From Their Suppliers

Concerning the question of competitive effect, the hearing examiner takes cognizance of the fact that in the grocery field profit margins are small, competition keen and small price differentials divert business.[4] In this connection, Mr. Philip Jones, a retailer who purchases corn and peaches from Hudson House of the same grade [fol. 38] and quality as that purchased by respondents testified as follows concerning the question of competitive effects:

* * * *

Q. Now, Mr. Jones, I refer you to Commission Exhibit 4, Page 60, of that booklet, and ask you if a competitor is selling three cans of peaches of this type and variety for the cost of two, for the price of two, does that have an effect on your peach business?

[4] See Tri-Valley Packing initial decision, Docket Nos. 7225 and 7496, page 19; also footnote 7 hereof.

A. Certainly.

Q. Can you tell me how, how it would affect your volume of peaches?

A. Well, at that rate, three cans would be—the consumer is paying 20 cents a can. I certainly couldn't meet that. It would be below my wholesale cost.

Q. With particular reference to Commission Exhibit 4 on page 61, can you tell me if a competitor of yours is selling corn, this type and variety, three cans for the price of two, what effect would that have on your business?

* * * *

A. It certainly would cut the sale of canned corn at that price.

Q. Can you afford to meet that competition, Mr. Jones?

A. No, sir. I can't even buy it at that.

* * * *

Mr. Louis L. Girod, a retailer who purchased canned peaches and corn from Hudson House and who is in competition with Fred Meyer, Inc. testified that he couldn't [fol. 39] break even if he sold his canned peaches at three cans for the price of two.

Mr. George A. Denfeld, another retailer who purchased canned corn and peaches from Hudson House had the following to say concerning the competitive effects of respondents' pricing practices because of the small profit margin:

* * * *

Q. What kind of competition did you encounter from Fred Meyer when you were located in the second store?

A. Very severe competition.

Q. In what form was this competition?

A. Price competition—coupon.

Q. What kind of coupons?

A. Well, they had the coupon book and that was very severe competition, and daily price competition.

* * * *

Q. During the time you operated the second store, will you tell us the factors that caused your sales to decline and decrease?

A. The greatest factor, I think, was the fact of direct competition with Fred Meyer. The customers would come in, and if your prices weren't the same as the Fred Meyer prices, you just didn't get the business.

* * * *

Mr. Earl S. Johnson, a retailer who purchased canned corn from Wadhams & Company in 1957 testified as follows concerning the competitive effects of respondents' policy of inducing preferential price concessions:

* * * *

[fol. 40] Q. I see. Now, Mr. Johnson, I direct your attention to Commission Exhibit 4, page 61, and ask you if a competitor across the street is selling canned corn of that style and nature at three cans for the price of two, would that have an effect on your corn business?

* * * *

A. It definitely would.

Q. In what manner? How seriously would that affect your corn business?

A. Well, let me explain my experience as to my customers coming into the store. I'd say there is 75 percent of them come in the store and have a coupon book in their purse or one sticking in their pocket.

* * * *

Q. You may continue, sir. What is the net result then of the customers coming into your store with these coupon books during the time you're trying to sell corn at the regular price?

* * * *

A. Well, I'd say we would be cut down.

* * * *

Respondents' practice of inducing discriminatory price concessions spilled over into the hosiery field, and as a result, a probable substantial lessening of competition occurred in that field. Mr. Roger S. Meier of Lipman, Wolfe & Company, a department store purchasing Burlington Industries hosiery of like grade and quality as those purchased by Fred Meyer, Inc., stated that his company takes advantage of any 2% ten day cash discount, and that such discounts are very important to Lipman,

Wolfe & Company. He further testified that he could sell [fol. 41] stockings at three pairs for $2.00, but would not make any money doing so.

The reasonable probability of a substantial lessening of competition occurred as a result of respondents' ability to induce discriminatory price concessions in connection with the purchase of Cannon Mills fingertip towels. Mr. Clarence E. Miller of Roberts Brothers, a department store purchasing Cannon fingertip towels of the grade and quality as those purchased by respondents, testified in this connection as follows:

* * * *

Q. Mr. Miller, did Roberts Brothers in 1956 take advantage of any 2 per cent 10 day discount?

* * * *

The Witness: It was our policy to take advantage of all discounts. At that particular time, we were taking advantage of Cannon on 3 percent 20 days.

Q. Why is that, Mr. Miller?

A. Well, we were very much interested in discounts because it added to the net returns of merchandise that we were selling.

Q. How important was 3 per cent as to your net returns?

A. Well, I'd say that 3 per cent in a division such as towels and linens, it would be an important factor.

* * * *

With regard to the price differential required to divert sales, Mr. Miller also testified as follows:

* * * *

[fol. 42] Q. Well, how much differential in price would it take to lose a sale of a Cannon product, such as this hand towel, to a competitor?

A. Well, that's something that there could probably be a lot of pro and con on, but my assumption would be that it wouldn't take a differential of very many cents to entice a customer from one store to another, depending on the convenience of location, and one thing or another. I think the easiest way to answer that would be that with regard to purchasing that towel from a resource, a few

cents on equal quality of merchandise would probably be sufficient to get it from a competitive resource.

* * * *

Q. That is, from other company besides Cannon?
A. Yes.

* * * *

It is apparent that competition between respondents and other retail outlets was keen, margins of profit low, and that price differences of a few cents would therefore divert sales. The discriminatory price concessions granted to respondents had the reasonably probable effect of substantially lessening competition or of tending to create a monopoly in the lines of commerce in which respondents and unfavored purchasers were engaged, or tending to injure, destroy or prevent competition with respondents.[5]

[fol. 43]

5. Respondents' Knowledge That Price Advantage Emanating From Their Coupon Program Was Discriminatory

Mr. Earle A. Chiles, president of corporate respondent, and also one of the two individual respondents, testified that in the preliminary negotiations for participation in the coupon programs, form letters are sent out to suppliers of the corporate respondent. He identified one of

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[5] See Corn Products Refining Co., et al. v. Federal Trade Commission, 324 U.S. 726, 738 (1945) in which the Supreme Court stated as follows:

> "It is to be observed that [Sec.] 2(a) does not require a finding that the discriminations in price have in fact had an adverse effect on competition. The statute is designed to reach such discriminations 'in their incipiency', before the harm to competition is effected. It is enough that they 'may' have the prescribed effect * * *" (Emphasis added).

See also, Moog Industries, Inc. v. F.T.C., 238 F.2d 43, 355 U.S. 411 (1958); Federal Trade Commission v. Morton Salt Co., 334 U.S. 37 (1948); P. Sorenson Mfg. Co., Inc. v. Federal Trade Commission, 246 F.2d 687 (C.A., D.C., 1957); P. & D. Mfg. Co. v. Federal Trade Commission, 245 F.2d 281 (C.A. 7, 1957); E. Edelmann & Company v. Federal Trade Commission, 239 F.2d 152 (C.A. 7, 1956); In the Matter of Fruitvale Canning Co., D. 5989, 52 F.T.C. 1504 (1956).

the forms used in contacting suppliers for the 1957 program. A similar form letter was sent out for the 1956 program. In connection with these two form letters, both contain the following statement which clearly indicated that respondents knew they were inducing discriminatory price concessions:

"Offer Must be Exclusive at Fred Meyer During the Four Week Period."

Thus, by respondents' own terms, their competitors could not participate in any similar program during the same period.

[fol. 44] Furthermore, according to the evidence, respondents initiated these coupon book programs. They were not initiated by suppliers. Under the circumstances and terms of such buyer initiation programs, respondents either knew or should have known that other competing buyers were not being offered these programs.

Another basis for finding that respondents knew, or should have known, that they were inducing unlawful price concessions is the fact they were aware that they were receiving price concessions which did not require any changes in the method of distribution by suppliers, or any changes in the manner in which respondents made purchases. In this connection, Mr. Henry A. Vanover of corporate respondent testified as follows:

* * * *

Q. During the 1957 coupon book promotion, did you stop buying through the broker through the coupon book promotion period?

A. No, sir.

Q. With respect to Tri-Valley?

A. No, sir.

* * * *

Q. During the 1957 coupon book promotion, did you change the nature of your shipments with Idaho Canning Company on their products?

A. No, sir.

Q. Was that still handled through a broker during the coupon book promotion?

A. Yes.

Q. Did you do anything during 1957 coupon book promotion that might result in a cost savings to Tri-Valley? [fol. 45] A. Did we do anything that would result in a cost savings to Tri-Valley?

Q. Yes. You say you didn't change the nature of your shipment. Did you change the nature of their distribution?

A. No.

Q. Would you also say that you did not change the nature of their selling transaction, that is, through a broker?

A. Right.

Q. Did you do anything in the 1957 coupon book promotion that might result in a cost savings to Idaho Canning?

A. No.

* * * * *

Relative to the Cannon Mills fingertip towels, an official of corporate respondent testified that on minimum purchases of 500 dozen of such towels the price was $1.65 per dozen. However, it should be noted during the 1956 coupon program, the price was $1.55 per dozen. Furthermore, the invoices of Cannon Mills to Roberts Brothers reveal that the regular price per dozen was $1.65 regardless of the quantity purchased. The invoices of both Fred Meyer, Inc. and Roberts Brothers indicate no savings in connection with methods of transportation and this was readily admitted by a representative of respondents.

With regard to the Burlington Industries' price concessions, an official of respondent corporation testified that he believed the regular price terms were net, sixty days. The invoices of Burlington sustain his statement. Al- [fol. 46] though knowing what the regular prices were, nevertheless, respondents sought and received special price concessions. Thus, they were put on notice that they might be receiving discriminatory price concessions not offered to competitors.

There is no evidence that Fred Meyer, Inc. made inquiry to ascertain whether or not the concessions they induced placed them in a favored position as a customer. To the contrary, it would appear that they sought a favored position.

6. Respondents' Inducement of Allowances, Services and Facilities

As previously suggested, the coupon book programs had a dual purpose. One purpose for the programs was to enable respondents to obtain payments and allowances for advertising activities. The other was to permit respondents to receive price concessions. The payment of $350, either in cash or in price concessions, by Tri-Valley Packing, Idaho Canning, Cannon Mills and Burlington Industries to respondents for the printing of a coupon page illustrating products sold by the aforesaid sellers is payment for services or facilities furnished, since the objective of the coupon books is to create consumer demand. As the consumers increase their purchases of the products illustrated, the sellers can reasonably expect respondents to augment their purchases from said sellers to meet this new demand. Thus, the illustrations in the coupon books clearly served the sellers' purpose of increasing sales of its products.

In addition, for the payment of $350, the sellers also obtained newspaper and radio advertising, as well as [fol. 47] store displays. Thus, it is clear that sellers do receive valuable services and facilities when making payments of $350 for illustrations of their products in the coupon books.

As the evidence reveals, when the payments to respondents exceeded $350, it was at this point that respondents were receiving price concessions, since no services were required for this additional amount.

Previous discussion of the coupon programs, in connection with price concessions, made reference to the fact that suppliers, including Tri-Valley Packing, Idaho Canning, Cannon Mills and Burlington Industries, were actively solicited by respondents to participate in the latter's programs. In this connection, it has been pointed out that the terms including the $350 required payment were established by respondents, and that participation in a coupon program had to be exclusively with respondents during a specified period. The terms and conditions of participation were determined by respondents.

Corroboratively, the evidence further discloses that Hudson House, Inc., Roberts Brothers, and Lipman, Wolfe

& Company, retail customers of Tri-Valley Packing, Idaho Canning, Cannon Mills and Burlington Industries, and in competition with respondents, did not receive from the aforenamed suppliers payments or allowances, or offers of payments or allowances, on proportionally equal terms to those granted respondents.

In addition to the coupon programs, the evidence discloses that Philip Morris, Inc., paid $500 to Fred Meyer, Inc., to participate in the Fred Meyer 1956 "Gift Days" [fol. 48] promotional program. On February 15, 1956, Philip Morris, Inc., also agreed to pay Fred Meyer, Inc., $150 per month to promote its tobacco products and such payments were made through December 31, 1956. On October 24, 1956, this tobacco company paid $800 to Fred Meyer, Inc., as consideration for the Fred Meyer promotion of Parliament cigarettes during the month of September 1956. Further, Philip Morris, Inc., paid $400 to corporate respondent, on April 26, 1957, for services rendered said supplier in connection with the Fred Meyer, Inc., 1957 "Thrift Days" promotion. Unlike typical supplier-initiated advertising transactions, each of the aforementioned transactions were buyer-initated.

During the same periods, at least two competitors of Fred Meyer, Inc., Oregon Piggly Wiggly Company and United Grocers, Inc., both of Portland, Oregon, made purchases of Philip Morris, Inc.'s cigarettes of like grade and quality as those sold to respondents on which advertising payments were granted. The proofs further disclose that these two competitors did not receive from Philip Morris, Inc., similar payments or allowances on proportionally equal terms. That such payments or allowances were not offered on proportionally equal terms to respondents' competitors is pointed out in the testimony of Mr. Robert E. Eberling, Division Manager of Philip Morris, Inc.:

* * * *

Q. Now, to the best of your knowledge and recollection, Mr. Eberling, do you recall making this offer of the same nature as indicated by Commission Exhibit 84-A [fol. 49] available to competing customers, to all competing customer, on a proportionally equal basis?

A. I can't recall.

* * * *

Q. Do they have to come to you and ask for it, Mr. Eberling?

A. On a special deal, yes.

Q. Now, isn't Commission Exhibit 88-A and B the same type of a deal with regard to Thrift Days promotion?

A. Yes.

Q. Whereas if a competing customer of Fred Meyer wanted that type of an allowance, he would have to come to you and ask for it?

A. It's available to them.

Q. But do you make the offer, Mr. Eberling?

A. No.

Q. And if it were available to them and if they wanted that, they would have to come to you and ask for it?

A. I would say so.

* * * *

7. Respondents' Knowledge That Allowances for Services and Facilities Were Discriminatory

Under circumstances where respondents received advertising payments pursuant to the coupon book programs, the previous conclusions pertaining to knowledge of receipt of discriminatory price concessions are applicable.

Obviously, a customer who causes a seller to grant him discriminatory advertising payments under programs [fol. 50] which are not seller initiated with terms that are individually negotiated must, by the exercise of reasonable diligence, determine whether or not such programs are being offered on proportionally equal terms to respondents' competitors. The failure of such customer to make reasonable inquiries concerning whether or not such programs, which might result in favored price treatment, are being offered to all competing customers, precludes any defense of a lack of scienter.

8. Merits of Respondents' Position Otherwise

Respondents indicate that as a prerequisite to proving a 2(f) violation of the amended Clayton Act, it is neces-

sary for the Commission to establish that the suppliers of the alleged favored buyer violated section 2(a) of that Act. Although this is a correct contention, it has been established by proof that section 2(a) of the amended Clayton Act has been violated by the suppliers of the respondents herein.

Counsel for respondents also suggests that it has not been established that the suppliers of Fred Meyer, Inc., et al., have violated section 2(d) of the Clayton Act. This contention is also without merit since it has been established that the suppliers of the respondents herein have violated section 2(d) of the Clayton Act.[6]

[fol. 51] Also without merit is respondents' contention that there has been a failure to show there is a reasonable possibility that the effect of the discounts and promotional allowances may be substantially to lessen competition or to injure, destroy or prevent competition. As heretofore pointed out, suppliers of the respondents granted discriminatory prices and allowances to and participated in the periodical promotional plans of Fred Meyer, Inc., which had the effect of giving said respondent a competitive advantage in a highly competitive market where profit margins were small.[7]

Since respondents herein have participated in and induced established violations of sections 2(a) and 2(d) of the Clayton Act on the part of their suppliers in such

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[6] See Tri-Valley Packing Association, Docket Nos. 7496 and 7225 of which the hearing examiner takes cognizance and official notice. See also Lifetime Cutlery Corp., et al., Docket No. 7292 hereinbefore referred to in footnote 3, hereof.

[7] See also page 19 of the Initial Decision, Tri-Valley Association, Docket No. 7225 and Docket No. 7496, to the following effect:

> "The concept with regard to competition among respondent's wholesale customers and injury thereto as enunciated in the Fruitvale case, is equally applicable in the within case. The discrimination in price herein shown must be considered in the light of the fact that the * * * business which furnishes the outlet for respondent's products is highly competitive. The evidence discloses that competition in such business is so keen that the mark-up on so-called fast moving items, such as canned fruits or vegetables, is very small, * * * A very small difference in price therefore, is sufficient to divert business from one seller to another, resulting injury to competition."

highly competitive and low profit markets, they are also culpable under section 2(f) of the Clayton Act and section 5 of the Federal Trade Commission Act, because [fol. 52] there is a reasonable probability that the suppliers' acts may be "substantially to lessen competition or injure, destroy, or prevent competition."

Conclusions

1. The Federal Trade Commission has jurisdiction of the acts and practices of respondents in this proceeding.

2. Respondents have violated section 2(f) of the amended Clayton Act as hereinbefore set forth.[8]

3. Respondents have violated section 5 of the Federal Trade Comission Act as hereinbefore set forth.[9]

It is concluded that this proceeding is in the public interest and the following order shall issue:

Order

It Is Ordered that respondent Fred Meyer, Inc., a corporation, and its officers, and Fred G. Meyer and Earle A. Chiles, individually and as officers of corporate re- [fol. 53] spondent, and respondents' agents, representatives and employees in connection with the offering to purchase or purchase in commerce, as "commerce" is defined in the amended Clayton Act, of products for resale in outlets operated by respondents, do forthwith cease and desist from:

Knowingly inducing, or knowingly receiving or accepting any discrimination in the price of such products and

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[8] Section 2(f) of the Clayton Act provides it shall be unlawful for any person engaged in commerce, or in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this Act.

[9] Respondents have violated section 5 of the Federal Trade Commission Act by inducing from suppliers discriminatory advertising or promotional payments which they knew, or should have known, were not being offered on proportionally equal terms to all other customers competing with the respondents in the distribution of such suppliers' products. See American News Company, et al., Docket No. 7396, Commission Opinion dated January 10, 1961 and Grand Union Company, Docket No. 6973, Commission Opinion dated August 12, 1960.

sary for the Commission to establish that the suppliers of the alleged favored buyer violated section 2(a) of that Act. Although this is a correct contention, it has been established by proof that section 2(a) of the amended Clayton Act has been violated by the suppliers of the respondents herein.

Counsel for respondents also suggests that it has not been established that the suppliers of Fred Meyer, Inc., et al., have violated section 2(d) of the Clayton Act. This contention is also without merit since it has been established that the suppliers of the respondents herein have violated section 2(d) of the Clayton Act.[6]

[fol. 51] Also without merit is respondents' contention that there has been a failure to show there is a reasonable possibility that the effect of the discounts and promotional allowances may be substantially to lessen competition or to injure, destroy or prevent competition. As heretofore pointed out, suppliers of the respondents granted discriminatory prices and allowances to and participated in the periodical promotional plans of Fred Meyer, Inc., which had the effect of giving said respondent a competitive advantage in a highly competitive market where profit margins were small.[7]

Since respondents herein have participated in and induced established violations of sections 2(a) and 2(d) of the Clayton Act on the part of their suppliers in such

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[6] See Tri-Valley Packing Association, Docket Nos. 7496 and 7225 of which the hearing examiner takes cognizance and official notice. See also Lifetime Cutlery Corp., et al., Docket No. 7292 hereinbefore referred to in footnote 3, hereof.

[7] See also page 19 of the Initial Decision, Tri-Valley Association, Docket No. 7225 and Docket No. 7496, to the following effect:

> "The concept with regard to competition among respondent's wholesale customers and injury thereto as enunciated in the Fruitvale case, is equally applicable in the within case. The discrimination in price herein shown must be considered in the light of the fact that the * * * business which furnishes the outlet for respondent's products is highly competitive. The evidence discloses that competition in such business is so keen that the mark-up on so-called fast moving items, such as canned fruits or vegetables, is very small, * * * A very small difference in price therefore, is sufficient to divert business from one seller to another, resulting injury to competition."

highly competitive and low profit markets, they are also culpable under section 2(f) of the Clayton Act and section 5 of the Federal Trade Commission Act, because [fol. 52] there is a reasonable probability that the suppliers' acts may be "substantially to lessen competition or injure, destroy, or prevent competition."

Conclusions

1. The Federal Trade Commission has jurisdiction of the acts and practices of respondents in this proceeding.

2. Respondents have violated section 2(f) of the amended Clayton Act as hereinbefore set forth.[8]

3. Respondents have violated section 5 of the Federal Trade Comission Act as hereinbefore set forth.[9]

It is concluded that this proceeding is in the public interest and the following order shall issue:

Order

It Is Ordered that respondent Fred Meyer, Inc., a corporation, and its officers, and Fred G. Meyer and Earle A. Chiles, individually and as officers of corporate re- [fol. 53] spondent, and respondents' agents, representatives and employees in connection with the offering to purchase or purchase in commerce, as "commerce" is defined in the amended Clayton Act, of products for resale in outlets operated by respondents, do forthwith cease and desist from:

Knowingly inducing, or knowingly receiving or accepting any discrimination in the price of such products and

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[8] Section 2(f) of the Clayton Act provides it shall be unlawful for any person engaged in commerce, or in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this Act.

[9] Respondents have violated section 5 of the Federal Trade Commission Act by inducing from suppliers discriminatory advertising or promotional payments which they knew, or should have known, were not being offered on proportionally equal terms to all other customers competing with the respondents in the distribution of such suppliers' products. See American News Company, et al., Docket No. 7396, Commission Opinion dated January 10, 1961 and Grand Union Company, Docket No. 6973, Commission Opinion dated August 12, 1960.

supplies, by directly or indirectly inducing, receiving or accepting from any seller a net price known, or that should have been known, by respondents to be below the net price at which said products and supplies of like grade and quality are being sold by such seller to other purchasers where:

(a) the seller is competing with any other seller for respondents' business;

(b) the respondents are competing with other purchasers of the seller;

(c) the respondents are competing with customers of other purchasers of the seller.

For the purpose of determining "net price" under the terms of this order, there shall be taken into account discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are effected.

It Is Further Ordered that respondent Fred Meyer, Inc., a corporation, and its officers, and Fred G. Meyer and Earle A. Chiles, individually and as officers of corporate respondent, and respondents' agents, representatives and employees, directly or through any corporate or other device in or in connection with any purchase in commerce, [fol. 54] as "commerce" is defined in the Federal Trade Commission Act, of products for resale in outlets operated by respondents, do forthwith cease and desist from:

Inducing, receiving or contracting for the receipt of anything of value as payment for or in consideration for advertising or any other services or facilities furnished by or through respondents in connection with the processing, handling, sale, or offering for sale of any such products manufactured, sold or offered for sale by the supplier, when the respective respondents know or should know that such payment or consideration is not made available by such supplier on proportionally equal terms to all its other customers competing with the respective respondents in the distribution of such products.

/s/ EDGAR A. BUTTLE,
Hearing Examiner.

January 23, 1962.

Received Jan. 25, 1962.

[fol. 56]

BEFORE FEDERAL TRADE COMMISSION

* * * * *

ORDER PROVIDING FOR THE FILING OF EXCEPTIONS TO PROPOSED FINAL ORDER—Issued March 29, 1963

This matter having been heard by the Commission upon respondents' exceptions to the initial decision and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission having ruled on said exceptions, and having determined that the order to cease and desist contained in said initial decision should be supplemented and modified to conform with the views expressed in the accompanying opinion:

It is ordered that respondents may, within twenty (20) days after service upon them of this order, file with the Commission their objections to the changes in the order to cease and desist contained in the initial decision, as shown by the following proposed order of the Commission, together with a statement of the reasons in support of their objections and a proposed alternative form of order appropriate to the Commission's decision.

Proposed Order

It is ordered that respondent Fred Meyer, Inc., a corporation, and its officers, and Fred G. Meyer and Earle A. Chiles, individually and as officers of corporate respondent, and respondents' agents, representatives and employees in connection with the offering to purchase or purchase in commerce, as "commerce" is defined in the amended Clayton Act, of products for resale in outlets operated by respondents, do forthwith cease and desist from:

[fol. 57] Knowingly inducing, or knowingly receiving or accepting, any discrimination in the price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price respondents know or should know is below the net price at which said products of like grade and quality are being sold by such seller to other customers where respondents are competing with the

purchaser paying the higher price or with a customer of the purchaser paying the higher price.

For the purpose of determining the "net price" under the terms of this order, there shall be taken into account all discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are effected.

It is further ordered that respondent Fred Meyer, Inc., a corporation, and its officers, and Fred G. Meyer and Earle A. Chiles, individually and as officers of corporate respondent, and respondents' agents, representatives and employees, directly or through any corporate or other device in or in connection with any purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of products for resale in outlets operated by respondents, do forthwith cease and desist from:

Inducing and receiving anything of any value from any supplier as compensation or in consideration for services or facilities furnished by or through respondents in connection with the processing, handling, sale or offering for sale of products purchased from such supplier, when respondents know or should know that such com- [fol. 58] pensation or consideration is not being affirmatively offered or otherwise made available by such supplier on proportionally equal terms to all of its other customers competing with respondents in the sale and distribution of such supplier's products, including other customers who resell to purchasers who compete with respondents in the resale of such supplier's products.

It Is Further Ordered that counsel in support of the complaint may, within ten (10) days after service upon him of respondents' objections, file a reply thereto.

Commissioner Anderson is in agreement with those portions of the opinion and order dealing with inducing price discrimination, but concurs in the result only on the question of inducing 2(d) violations.

Commissioner Elman concurred in part and dissented in part for the reasons set out in his opinion.

Commissioner Higginbotham did not participate by reason of the fact that this matter was argued before the Commission prior to the time he was sworn into office.

By the Commission.

/s/ JOSEPH W. SHEA,
Secretary.

Issued: March 29, 1963.

[fol. 59]

BEFORE FEDERAL TRADE COMMISSION

* * * *

OPINION OF THE COMMISSION—March 29, 1963

By Dixon, Commissioner:

Respondents appeal from the hearing examiner's initial decision holding that they have (1) engaged in an "unfair" method of competition in violation of Section 5 of the Federal Trade Commission Act [1] by "knowingly inducing" certain of their suppliers to grant them promotional allowances those suppliers were forbidden to give by Section 2(d) of the amended Clayton Act,[2] and (2)

[1] Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, provides in pertinent part that: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

[2] Section 2(d) of the amended Clayton Act, 15 U.S.C. 13(d), provides:

"That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products

violated Section 2(f) of the latter statute [3] by "knowing-[fol. 60] ly inducing" certain of those same suppliers to grant them discriminatory prices prohibited by Section 2 (a) of the Act.[4]

Respondent Fred Meyer, Inc., an Oregon corporation, operates thirteen retail supermarkets in Portland, Oregon, and immediate vicinity. In addition to the usual grocery products, it sells drugs, variety items, and a limited line of clothing. In 1957, its sales exceeded $40 million. According to its 1960 prospectus, it sells one-fourth of all food sold at retail in the Portland area and is the second largest seller of all goods in that area.[5] Its promotional literature states that it "sells 75% of Oregon's population" and that, in Portland, it has "one [Supermarket] in every neighborhood." [6]

[fol. 61] The individual respondents—Fred G. Meyer and Earle A. Chiles—are Chairman of the Board, and

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or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

[3] Section 2(f), 15 U.S.C. 13(f), provides:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

[4] Section 2(a), 15 U.S.C. 13(a), provides:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . ."

[5] CX 363, p. 7.

[6] CX 20.

President, respectively, of the corporate respondent, and the principal owners of its voting common stock.

On this appeal, respondents' principal contentions are that the examiner erred (1) in finding that the suppliers in question had in fact granted them promotional allowances and price concessions prohibited by the applicable seller-liability provisions of the amended Clayton Act, Sections 2(d) and 2(a); (2) in finding that respondents "knew" or should have known that the concessions thus received were unlawful under those statutory provisions; and (3) in making the order to cease and desist unduly broad.

Within the general gramework of the first of these contentions, respondents challenge the sufficiency of the record in regard to virtually all of the principal elements of seller-liability under Sections 2(d) and 2(a). They claim that the evidence is insufficient to show that they in fact received promotional allowances not made available to competing buyers on proportionally equal terms; that they received lower prices than those charged to competing buyers; that they resold goods of "like grade and quality" in "competition" with nonfavored buyers; and that the price discriminations found by the examiner might have the effect of substantially injuring competition.

I.

The facts on which the examiner based his findings that respondents had received preferential treatment from certain of their suppliers are relatively uncomplicated. Thus, [fol. 62] the Section 5 charge (inducement of unlawful promotional allowances) involves (1) a number of unrelated promotional payments made to respondents by a single supplier, Philip Morris, Inc., and (2) payments made to respondents by a number of their suppliers under a promotional plan called the "coupon book" promotion. The Section 2(f) charge (inducement of unlawful price discriminations) is based solely on that same "coupon book" promotion.

In the latter connection, it should be noted that one of respondents' principal contentions is that the sums of

money they received from their suppliers under that "coupon book" promotion (in cash, free goods, etc.) are all promotional allowances cognizable only, if at all, under the Section 2(d)-5 charge, and that there is no basis for characterizing any part of those sums as "price" concessions within the meaning of Sections 2(a) or 2(f).

Respondents began their "coupon book" promotion in approximately 1936. Each year since then, beginning always in the month of September and ending in October—and lasting always for a period of exactly four weeks—they sell certain items in their stores under the coupon book plan. The crux of that plan is that a consumer-customer owning one of respondents' coupon books can avail himself of the specially reduced retail prices quoted in the book on the products illustrated therein. Each book contains 72 "pages" and each page features a single product. On that page, there is usually a graphic representation of the item in question; a statement as to its "regular" price (which is, in fact, the price at which respondents have been selling it in the regular course of their busi- [fol. 63] ness); the specially reduced "coupon" price; the amount, in dollars and cents, that the coupon is thus "worth" in savings to the consumer; and various other statements common in advertising material. Thus, in respondents' 1957 "coupon book,"[7] one page[8] pictures three cans of peaches and declares that their "regular" price is 31¢; that one such can will be given "free" "with purchase of two cans at our regular low price"; that the "coupon" is thus "worth" 31¢; that the peaches "are the finest money can buy;" and that they can be purchased in the "Grocery Sections" at "Fred Meyer, Inc., Locally Owned-Locally Operated." The reverse side of the page, after describing how further savings can be effected at Fred Meyer (complete with Meyer's telephone number and the extension on which to reach "our headquarters grocery desk") instructs the consumer to: "Please Tear Out Coupons Before Reaching Checkstand." In short, page 60 of

[7] CX 4. Respondents' 1956 and 1958 coupon books are included in the record as CX 1 and 24, respectively.

[8] CX 4, p. 60.

respondents' 1957 coupon book is a certificate entitling the bearer thereof, upon presentation at the cash register of any of Fred Meyer's thirteen retails supermarkets, to buy peaches at ⅓ less than the regular retail price. The remaining 71 pages in that book offered similar bargains on other products.[9] Because of the obvious attractiveness [fol. 64] of these prices (the cover of the 1957 book states that the use of all 72 coupons can result in total savings of "over $54.00"). consumers are willing to pay respondents the nominal price of 10¢ that is charged for the book. In 1957, consumers paid a total of $13,870 for the books (138,000 books at 10¢ each). In 1958, respondents received $12,127 from the sale of the books at that price.

While these amounts were not enough to cover the actual costs of publishing, distributing, and promoting the coupon books, they were not needed for that purpose. That tab was picked up by "participating" suppliers, each of whom had, in effect, bought a single page in respondents' coupon book. That page cost each of them $350, payment being made in cash, free goods, or in some other mutually acceptable manner. Since 72 suppliers "participated" in each coupon book, respondents received approximately $25,200 (72 times $350) from their suppliers for the publication of the coupon book each year. This was not an arbitrary figure. The actual costs incurred by respondents in publishing, distributing, and publicizing the books—including art work, typesetting, printing, distribution, sale, and advertising (including newspaper, radio, and point-of-purchase)—amounted to $23,318 in 1956 and $23,406 in 1957. It is plain, therefore, that the $350 respondents charged each of the participating suppliers for their "page" in the coupon books was calculated to, and did in fact, merely reimburse respondents for the expense of promoting 72 products illustrated in the books. We agree with the examiner, therefore, that the $350 paid by each participating supplier was a payment "as compensation or [fol. 65] in consideration for . . . services or facilities fur-

[9] E.g., page 34 offered nylon hose, regularly priced at 98¢ per pair, for 79¢ per pair (or 3 for $2.25); page 39 offered 69¢ hand towels for 39¢ each (or 4 for $1.50); and page 61 offered three 15¢ cans of corn for the regular price of two.

nished by . . . such customer in connection with the . . . sale, or offering for sale" of that supplier's product and was, therefore, cognizable under Section 2(d) of the amended Clayton Act.

Having thus successfully passed on to their suppliers the entire cost of the publication and distribution of the coupon books, the money respondents received from the sale of the books to consumer-customers ($13,870 in 1957) represented clear profit [10] to them on that phase of the program. That was not the end of it, however, since they sill had to "redeem" the coupons in the hands of the consumers—and someone had to absorb the cut in profits that sales at those bargain prices necessarily involved. This, too, was passed on to respondents' "participating" [fol. 66] supplier, either in whole or in part, by having each supplier agree that, in addition to paying $350 for a "page" in the coupon book, it would "redeem" the coupons or, at least, make some contribution to respondents' costs in making good on them. Thus, a form letter used in soliciting supplier-participation stated that: *"Other than the coupon redemption,* the only additional cost to you is $350.00 for a full page coupon. This includes all art work, type setting, printing, distribution, sale and handling costs." [11] This instrument suggested a number of ways by which the participating supplier could "redeem"

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[10] Respondents' own figures for their receipts and expenditures in connection with the coupon books show a small net loss to them even after including the receipts from consumers (see CX 13). But this is apparently based on their conclusion that only *cash* payments (not those made in free goods) should be included under "sale of coupon pages." The testimony is plain that *at least* $350 was received (in cash, free goods, or otherwise) from *each* of the 72 participating suppliers: ". . . [W]ithin the bounds, so much per page, that part was standard; and then from then on, why, just whatever happened, whatever deal he [the buyer] could work out." Tr. 694. In their brief respondents state that: "Participating vendors [those whose products are featured in the coupon books] pay $350 per coupon page." Respondents' brief, p. 28. Since 72 times $350 is $25,200, respondents' figure of $9,250 as the amount realized from the "sale of coupon book pages" (CX 13) is necessarily inaccurate.

[11] CX 7 (emphasis added).

his coupons, including the giving of "free items" to replace those given away by respondents, "reduced price on single items . . . or any other method you may devise that will be of real value to the consumer to make her want to use your product." Thus, one supplier, Tri-Valley Packing Association, in consideration for having its canned peaches illustrated in respondents' 1957 coupon book and resold to consumers at the 3-for-the-price-of-2 discussed above, contracted to "participate" on the following terms:

> We will participate in Fred Meyer Coupon Book Promotion . . . to extend from Sept. 25, 1957 to Oct. 23, 1957 for which we agree to pay $350.00 for page . . . plus redeeming each coupon at current price (Sept) of a 30 oz can of My Te Fine Yellow Cling Peaches . . . Tri-Valley reserves right to compensate Fred Meyer Co with merchandise . . . in lieu of cash.[12]

[fol. 67] During the 4-week period of this 1957 coupon book promotion, Portland consumers presented 20,750 of the "peaches" coupons at respondents' stores. In accordance with the terms stated on the face of the coupons, respondents "redeemed" those coupons by permitting each of the 20,750 consumer-bearers to purchase three cans of peaches (regularly priced at 31¢ per can) for the regular retail price of two, i.e., the retail price of three cans of peaches was reduced by 33⅓% (from 93¢ to 62¢).

Stated another way, each of the 20,750 "redeemed" coupons represented a transaction in which a Portland consumer, in consideration for her purchase of two cans of peaches at the regular retail price of 31¢ per can, was given a third can free. Hence the sum total of the "peaches" promotion was that respondents, in conjunction with the sale of 41,500 cans of peaches at the full retail price of 31¢ per can, gave away an additional 20,750 cans free of charge.

These 20,750 cans given away during the 4-week promotional period cost respondents nothing. They were simply replaced by the supplier. In accordance with the

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[12] CX 21.

agreement quoted above between respondents and their supplier, Tri-Valley, they invoiced the latter as follows:

Fred Meyer 1957 Coupon Book

1 Full Page in Book	$ 350.00
20,750 Coupons Redeemed @ .232	4814.00
	$5164.00[13]

[fol. 68] Tri-Valley paid this invoice by shipping to respondents, similarly free of charge, $5,164 worth of peaches.[14] The net result of the entire transaction, of course, is that respondents, without spending a cent of their own money, received (1) $350 worth of advertising for their stores and a product sold by them, plus (2) a 33⅓% reduction in price (worth $4,814), which they used to reduce the resale price of the peaches and thus to take business from their competitors.

Idaho Canning, another supplier, "participated" in precisely the same manner. It paid $350 for "1 Full Page in Book," plus $2,585.41 for "21367 Coupons redeemed @ .121," or a total of $2,935.41, all of which was paid to respondents in the form of free goods (canned corn).[15] This similarly compensated respondents fully for the cost of the "page" in the coupon book, in addition to giving them a 33⅓% price reduction (which they passed on to the consumer by selling, in accordance with the offer appearing on the face of the coupon, three cans of corn for the regular retail price of two).

Two of the other transactions cited by the examiner illustrate another form of supplier "participation" in respondents' coupon book promotion. Thus, Cannon Mills participated in the 1956 coupon book by reducing its price (to respondents) on fingertip towels from $1.65 per dozen to $1.55.[16] While this did not fully compensate re-
[fol. 69] spondents for the total amount by which they

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[13] CX 26.

[14] CX 27.

[15] The terms of the Idaho deal are set forth on CX 16. See also CX 39 (invoice) and CX 205-207, 209, 210.

[16] CX 114.

in turn reduced the resale price of the goods,[17] the aggregate of this concession amounted to $750, or $400 more than the cost of the "page" in the coupon book, and thus contributed substantially to "respondents' business of selling goods to the consumer at reduced prices." [18] The same is true of the 1957 and 1958 participation of Burlington Industries, Inc.; that supplier merely reduced the price of its nylon hose, to respondents, by amounts ranging from 50¢ to 94¢ per dozen. The aggregate of these concessions amounted to $1,700 in 1957 and $1,800 in 1958. As in the Cannon Mills transaction, these were not as great as those respondents themselves made to the consumer,[19] but they similarly exceeded the cost of the coupon "pages" (by $1,350 and $1,450, respectively) and thus contributed to respondents' ability to undersell their competitors.

Respondents' contention that these entire amounts, e.g., the $5,164 received from Tri-Valley in 1957, the $2,935.41 received from Idaho Canning in 1957, the $750 received from Cannon Mills in 1956, and the $1,700 and $1,800 received from Burlington Industries in 1957 and [fol. 70] 1958, respectively, are "promotional allowances" only, and thus not cognizable under Sections 2(a) and 2(f), is rejected. The first $350 of each suppliers' payment was a true promotional allowance inasmuch as that amount was intended by the parties to, and did in fact, constitute "compensation" or "consideration" for promotional services actually rendered by respondents for the benefit of the paying supplier. It would appear that each supplier, by having his product featured on a page in 138,000 coupon books placed in the hands of Portland consumers, received full value for his $350. (As noted.

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[17] The "coupon" in the 1956 book offered the towels at 7 for the price of $1.00 (CX 1, p. 37), whereas they regularly sold for 23¢ each.

[18] Initial decision, p. 11.

[19] The 1957 coupon (CX 4, p. 34) featured the hose, which regularly sold for 98¢ per pair, at the special price of 79¢ per pair, or 3 pairs for $2.25. The 1958 coupon (CX 24, p. 34) featured the same 98¢ hose for 69¢ per pair, or 3 for $2.00. The 1957 and 1958 "deals" are described by CX 140 and 156.

this was the approximate cost to the respondents of publishing, distributing, and advertising the coupon books, and the value the parties themselves, in the contracts and billings, placed on that service.)

But the remaining amounts paid by each participating supplier were of an entirely different character. Taking the $5,164 payment from Tri-Valley to respondents as an example, it is obvious enough that $4,814 of this (the excess over the $350 promotional payment) was an outright price concession. Where money or something of value is given by a seller to a buyer without even the contemplation of promotional services by the purchaser, there has been no payment "as compensation or in consideration" for such services, and Section 2(d) is therefore not applicable. Yakima Fruit & Cold Storage Co., Dkt. 7718, opinion of the Commission 1, September 28, 1961.

Had the $4,814 been an arbitrary sum bearing no relation to the volume of respondents' purchases, its inducement could have been treated as an unfair method of [fol. 71] competition under Section 5. R. H. Macy & Co., Inc., Dkt. 7869, opinion of the Commission, May 15, 1962. But where, as here, the aggregate amount of the concession is directly related to the number of units purchased, its true character as a price concession is so clear that we are persuaded it should be treated in the manner prescribed by Congress in Section 2 (a) and Section 2(f) of the amended Clayton Act.[20]

The only possible "service" that respondents' performed in return for the $4,814 is that they resold the goods at the same ⅓ price reduction that they had received from the supplier. (They actually agreed to do so.[21]) But this "passing on" of the discriminatory lower price is the very worst of the vices involved in price discrimination. Indeed, the injury that occurs to compe-

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[20] "Allowances paid without something so furnished in return would be subject to attack under the general discrimination provisions of paragraph (a)." Remarks of Mr. Teegarden, Hearings before the House Committee on the Judiciary on Bills to Amend the Clayton Act, 74th Cong., 1st Sess. 38 (1935).

[21] Respondents' resale price, "buy two cans and get one free," was a part of the agreement signed by Tri-Valley. CX 21.

tition when a favored buyer uses the concessions he has received to undercut the prices of his competitors and thereby take their customers from them is so obvious that the Commission and the courts have been required to hold expressly that this "passing on" of the discriminatory [fol. 72] concession in the form of lower resale price is not *necessary* to a finding of secondary line injury.[22] Thus it would be a strange result indeed if we were to hold that a buyer, by passing on to his own customers a price discrimination he has received from his supplier, has merely performed a "promotional service" for that supplier!

The true character of these coupons "redemption" payments as outright price discriminations is well illustrated by our decision in National Tea Co., 46 F.T.C. 829 (1950), order modified, 47 F.T.C. 1314 (1951), where we condemned an almost idential "coupon book" program as a violation of Section 2(f). There National Tea had advertised various "offers" to the public, one of which was called the "Multi-Million Dollar Profit-Sharing Plan." Under this "plan," National Tea offered to give away approximately 500,000 "coupon books" containing approximately 25 million "coupons." Each of the "coupons" (1) depicted on its face a specific item of merchandise sold by National Tea in its various retail stores, and (2) "was of a designated cash value when used and applied to the purchase of the merchandise depicted thereon." 46 F.T.C. at 834. The aggregate "cash value" of the coupons was $2,700,000. Pursuant to agreements solicited from and made with its "participating" suppliers, Na- [fol. 73] tional Tea was "reimbursed" in the following manner:

> Upon the redemption of said coupons by the respondent, they were in turn delivered to the respective sellers in connection with the resale of whose mer-

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[22] Corn Products Refining Co. v. Federal Trade Commission, 324 U.S. 726 (1945); Moog Industries, Inc. v. Federal Trade Commission, 238 F.2d 43 (8th Cir. 1956); E. Edelmann & Co. v. Federal Trade Commission, 239 F.2d 152 (7th Cir. 1956); Tri-Valley Packing Assoc., Dkts. 7225, 7496, opinion of the Commission, May 10, 1962, p. 5.

chandise said coupons were issued, and each of such sellers participating in the plan thereupon reimbursed and paid to the respondent the designated cash value appearing on such coupons. Ibid.

The Commission found that, through this "coupon book" plan, National Tea (1) "was enabled therein at prices below the sellers' customary and normal prices to the respondent and its competitors," and (2) "was enabled to and did resell said merchandise below the customary and normal retail prices usually obtained by it and by its competitors for such merchandise," thereby violating Section 2(f).

The only noteworthy distinction between that case and the instant one is that, whereas National Tea had merely induced its "participating" suppliers to give it a *price* concession to "reimburse" it for the lower retail price it had accorded to the consumer, without having those suppliers also bear the cost of getting the "coupons" into the consumers' hands, these respondents induced their suppliers to do both. We do not think the National Tea coupon book plan would have lost its character as a *price* discrimination and become merely a "promotional allowance" if, in *addition* to reimbursing National Tea for the difference between its "coupon" price and its regular [fol. 74] retail price, that respondent had also been paid, by those same suppliers, the cost of publishing, distributing, and advertising that plan. Respondents themselves have clearly recognized, in their agreements with their "participating" suppliers, the distinction between the promotional aspects of the program and the pricing part. First they wanted to get back the $350 that it cost them to inform the Portland consumer that they were selling peaches at ⅓ less than the regular retail price. Then they wanted to get back that ⅓ price concession itself. This the $4,814 accomplished.

Either of these two aspects of the case could be eliminated and the other would still stand. Thus, the $350 promotional payments offend Section 2(d) because, and only because, they were not made available to respondents' competitor on proportionally equal terms. Therefore, this aspect of the case would remain even if re-

spondents, while receiving the $350 promotional payments, had themselves absorbed, out of their own pockets, the full cost of selling at the reduced "coupon" prices ($4,814). Similarly, under the National Tea case, supra, the $4,814 payment, in giving respondents a ⅓ lower price which permitted them to resell at ⅓ less than their regular retail price without sacrificing any part of their per unit profit margin, would be cognizable under Sections 2(a) and 2(f) even if respondents had themselves borne the $350 cost of publishing, distributing, and advertising the "coupon books." Indeed suppliers often pay for retailer-advertisements that feature reduced prices without paying for the reduced prices themselves; and suppliers often given discriminatory price concessions that [fol. 75] make such reduced retail prices possible without paying for the advertisement that communicates those prices to the public. When the supplier pays for his customer's advertisements, it is a promotional allowance within the meaning of Section 2(d). But when the supplier gives the customer a lower price—whether in the form of an outright reduction from the unit price being charged other purchasers (as in Cannon Mills' "participation" whereby it sold towels to respondents for $1.55 per dozen while charging other buyers $1.65), or in the form of "reimbursement" or replacement of "free" goods given away by the customer—it is a price discrimination within the meaning of Sections 2(a) and 2(f). We are not persuaded that a supplier and its favored customer can convert a 33⅓% price concession into a promotional allowance by merely combining it with a further payment by the supplier for an advertisment that communicates, to the public, the use that the favored customer proposes to make of the discriminatory price.

In addition to the "coupon book" program, there are, as noted above, the unrelated promotional payments received by respondents from one of their suppliers, Philip Morris, Inc. These include: (1) $500 for that suppliers' participation in respondents' 1956 "Gift Days" promotion; (2) $150 per month during most of the year 1956 as consideration for their promotion of Philip Morris tobacco products; (3) $800 paid on October 24, 1956, as

consideration for their promotion of Parliament cigarettes during the single month of September 1956; and (4) \$400 paid to respondents in connection with their promo-
[fol. 76] tion of its product during their "Thrift Days" promotion in 1957.[23] Since valuable services were actually performed by respondents for these moneys (shelf display, etc.) no question of price discrimination is involved here. Like the first \$350 paid by each of the participants in the "coupon book" promotion, the sums are promotional allowances within the meaning of Section 2(d) of the amended Clayton Act.

II.

Respondents do not deny, of course, that they have in fact received the promotional payments described above. They contend, however, that the record fails to show that any other buyers who compete with them in the resale of the goods were not paid or offered such payments on proportionally equal terms. Thus, they point to the fact that two of their competitors—Oregon Piggy Wiggly Company and United Grocers, Inc.—in fact received a number of promotional payments from Philip Morris during the years 1956-1958 and that, because the record is silent as to the comparative volume of purchases by respondents on the one hand and those two non-favored buyers on the other, it is impossible to determine whether or not Philip Morris fairly apportioned its promotional money among them. But there is no need for any such determination here. While those other buyers received Philip Morris' "regular" promotional allowances,[24] re-
[fol. 77] spondents received, in *addition* to those regular

[23] Initial decision, p. 23.

[24] One of the payments pointed to by respondents is a \$357.75 payment received by Piggly Wiggly from Philip Morris. There Piggly Wiggly had given consumers a six-pack of Pepsi Cola with each carton of Philip Morris cigarettes purchased, and Philip Morris reimbursed Piggly Wiggly for the cost of the Pepsi thus given away. Tr. 256-257. Thus the payment was not an arbitrary, flat sum, but an allowance of so-much-per-carton, the type of formula used by Philip Morris in dispensing its "regular" promotional payments.

allowances, "special deals" [25] that (1) were not offered to those non-favored buyers, and hence were not "available" to them, and (2) even if they had been made "available," were virtually incapable of being offered on "proportionally equal" terms.

On the first point, the evidence is direct and clear. A representative of Philip Morris testified flatly that those "special deals" were *not* offered to the non-favored customers.[26] And even the mechanics of the initiation and [fol. 78] handling of respondents' "deals" with that supplier show that these were wholly outside its general, openly-announced promotional plan and that there was never any intention of offering them to respondents' competitors. Whereas the "regular" promotional allowances originated at Philip Morris' New York office, were publicized by a Philip Morris "letter to all direct accounts," and were paid after the customer submitted his bill to

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[25] Phillip Morris' Divisional Manager testified as follows:

Q. Now, then, Mr. Eberling, I hand you a document marked Commission Exhibit 84-A and B and ask you if the $800 allowance as indicated on that document with reference to Parliament cigarettes is of the same nature, to your own knowledge, of the same nature as this ten cents per carton and three dollars per case type?

"A. I don't think it is." Tr. 605, 607.

See also notes 26 and 28, supra.

[26] "Q. Now, to the best of your knowledge and recollection, Mr. Eberling, do you recall making this offer of the same nature as indicated by Commission Exhibit 84-A available to competing customers, to all competing customers, on a proportionately equal basis?

"A. I can't recall.

. . .

"Q. Do they have to come to you and ask you for it, Mr. Eberling?

"A. On a *special deal*, yes.

. . .

"Q. Whereas if a competing customer of Fred Meyer wanted that type of an allowance, he would have to come to you and ask for it?

"A. It's available to them.

"Q. *But do you make the offer*, Mr. Everling?

"A. No." Tr. 606-607 (emphasis added).

Philip Morris' New York office, the "special deals" accorded to respondents were (1) initiated by respondents themselves, (2) were negotiated with Philip Morris' local Divisional Manager, and (3) were paid upon respondents' submission of their bill to that Divisional Manager.[27] We think a supplier's failure to inform a favored customer's competitors of the "availability" of [fol. 79] such promotional allowances is tantamount to concealment, and effectively precludes those competitors from participating in them.[28]

Further, we believe the "special deals" received by respondents from Philip Morris were, by their very nature incapable of being offered to all competing buyers on "proportionally equal" terms. Whereas the "regular" Philip Morris allowances originated by its New York office were directy related to the volume of the recipient's purchases, e.g., 10¢ per carton, $3 per case, etc., the payments involved here were flat sums ($500, $800, $400, $150 per month) based on nothing more than the parties' mutual evaluation of the specially tailored services respondents had offered to perform and Philip Morris had agreed to pay for. Thus, one of the "services" performed by respondents and paid for by Philip Morris was the display of Philip Morris products, for an agreed period of time, on particularly desirable shelf space in respondents' stores. The amount of the promotional payment, e.g., $800, $150 per month, etc., was fixed in advance of performance and would have remained the same regardless of the volume of respondents' purchases during that pe- [fol. 80] riod of time. (Respondents' own tobacco buyer admitted these distinctions between the "special" and

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[27] Tr. 604-606.

[28] "A course of conduct under which a seller fails to inform respecting such compensation or make known his terms or otherwise to offer them to one customer while granting payment for services to his rival reseller essentially represents concealment. In such case, the credit or allowance is not 'available' to the unfavored competitor, for all practical purposes a withholding and denial of opportunity to share occur, and the law is violated." Kay Windsor Frocks, Inc., 51 F.T.C. 89, 95 (1954). See also Chestnut Farms Chevy Chase Dairy, 53 F.T.C. 1050, 1060 (1957).

regular promotional allowances received from Philip Morris, testifying that respondents participated in both; that she initiated the one and the supplier the other; and that she could tell whether a particular allowance was buyer or supplier initiated from the nature of the payment itself.[29])

It can be assumed, of course, that the amount of these payments bore a reasonable relationship to the value of those services to Philip Morris. But the concern of Section 2(d) is not so much with whether or not the supplier gets his money's worth from the customer who performs, [fol. 81] but whether other customers who compete with the receiving buyer have an opportunity to perform those same services and be paid on proportionally equal terms. Thus in Vanity Fair Paper Mills, Inc. v. Federal Trade Commission, CCH 1962 Trade Cases Par. 70,569 (2d Cir. 1962), Vanity Fair had a "policy" whereby it would "take under consideration any request made by any customer for respondent's participation" in certain promotions, provided the "payment requested for services rendered therein was in an amount reasonably related to the cost of the services to the customer." One customer, is requesting Vanity Fair to participate in that customer's Anniversary Sale, submitted a schedule giving the supplier "a choice of various possible commitments." These ranged from $56.05 (which would have provided a news-

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[29] "Q. Now, would that transaction [$3 per case allowance] have been initiated by yourself, or by the manufacturer's representative?

"A. No. That would be by the manufacturer.

"Q. How can you tell?

"A. Well, because of the type of—this isn't uncommon.

"Q. The three dollar per case allowance?

"A. No—to allow a certain amount on purchases, and *on that we're generally notified by circular.*

. . . .

"Q. As a matter of fact, isn't it more or less dependent on the type of transaction whether the manufacturer's representative had offered that to you or you had solicited that? For example, I hand you Commission's Exhibit 86. Isn't ten cents per carton the type of a transaction that would be *offered* to you?

"A. Yes." Tr. 396-397 (emphasis added).

paper ad in a local newspaper covering 1/16 of a page, plus other services) to $3,995.90 (for a full page newspaper ad in a number of areas, in addition to various other services). Vanity Fair elected to "participate" for an in-between deal that cost it $215. The Court said:

> Altogether consistently with its policy, respondent could have paid Weingarten as much as $3995.90 and an identically situated competitor, offering it [respondent] the same choices as Weingarten, as little as $56.05. It is true that since Weingarten would have had to furnish more newspaper advertising than its competitor, respondent would have derived a greater benefit from the larger payment . . . But Weingarten would have received an enormously greater benefit from respondent than the [fol. 82] equally entitled competitor . . . Neither did the policy make any attempt to relate the amount of support accorded different customers to their respective volumes of purchases. . . . Whatever the statute does or does not require with respect to proportionality, it is not satisfied by a policy as loose as respondent's . . .; this affords the very opportunity for disparate treatment which the Robinson-Patman Act aimed to end.

The "special deals" received by the instant respondents are subject to the same objection. Thus, even if Philip Morris had advised the non-favored buyers that it would consider paying for any promotional services they might offer to perform, there would have been no basis for measuring proportional equality. Two customers sitting side by side and purchasing in precisely the same volume, even if they fortuitously happened to propose the same type and quantum of services, and happened to ask the supplier to pay the same amount therefor, would not necessarily receive proportionally equal treatment. The supplier could discriminate between them by electing to buy *all* of Customer A's proffered services for, say, $1,000, while electing to buy only one-half of Customer B's proposed services for $500. So "loose" a plan, if it can be called a plan at all, surely falls short of compliance with Section 2(d).

Similarly, we think the record is plain that the "coupon book" allowances were not made available on proportionally equal terms to four other Portland buyers who bought the same products and resold them in that area: (1) Hudson House, a Portland wholesaler and retailer, who [fol. 83] bought canned peaches from Tri-Valley Packing; (2) Wadhams & Co., another Portland wholesaler, who, along with Hudson House, bought canned corn from Idaho Canning; (3) Lipman, Wolfe & Co., a Portland department store, who bought nylon hose from Burlington Industries; and (4) Roberts Brothers, another Portland department store, who bought fingertip towels from Cannon Mills. Representatives of each of these buyers testified that they had bought the goods in question during the periods of time in which respondents had carried on these particular coupon book promotions (September and October of 1956-1958), but that no offer of any promotional allowances or payments had been received during those periods of time.[30]

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[30] It should be noted that the members of this industry use a terminology here that is somewhat at variance with the legal meaning of these various phrases. To them, a "promotional allowance" is synonymous with a *price* reduction, i.e., the supplier pays without expecting any kind of performance in return. To designate a genuine promotional allowance within the meaning of Section 2(d) —one that actually requires the performance of promotional services by the buyer—they speak of an "advertising" allowance. Tr. 173-185, 642. The witnesses were quite clear that they had been offered no allowances of the latter character. Tr. 173-185, 370, 446. Indeed, two of the suppliers in question, Tri-Valley and Idaho Canning, testified that they had no such programs. Tr. 505, 642, 675.

One of the non-favored buyers named above, Hudson House, did receive a "promotional allowance" (as that term is used in the industry) during one of the coupon book periods from a participating supplier, Tri-Valley. This was a flat "allowance" of $100, given on the occasion of Hudson House's 50th Anniversary Sale. Tr. 644-649. The record suggests that no performance was expected, or given, in return for the money. Hence it cannot be considered a promotional allowance within the meaning of Section 2(d), and, acordingly, there is no necessity for us to determine whether or not this $100 represents Hudson House's "proportionally equal" share of Tri-Valley's promotional funds.

[fol. 84] We are further of the opinion that all six of the non-favored buyers mentioned above—including the four that purchased from the suppliers who participated in respondents' 1956-1958 "coupon book" program and the two that bought from Philip Morris but failed to receive the "special" promotional allowances accorded to respondents—"competed" with respondents in the "distribution" of the products in question and were therefore entitled, under Section 2(d) of the amended Clayton Act, to share in those allowances on a proportionally equal basis.

In the case of the two department stores, Roberts Brothers and Lipman, Wolfe & Co., and the two retail grocery groups, Piggly Wiggly and United, the proof on this point is clear. A representative of Roberts Brothers testified that his company bought Cannon towels during the period of respondents' coupon book promotion and resold them in competition with respondents.[31] A representative of Lipman, Wolfe & Co. testified to the same effect in regard to nylon hose purchased from Burlington Industries.[32] And there can be no question but that the retail stores of Piggly Wiggly and United Grocers resold [fol. 85] Philip Morris' tobacco products in direct competition with respondents' retail stores.[33]

Respondents contend, however, that two of these, United Grocers and Hudson House, were not entitled to a proportionally equal share of the promotional allowances in question because they are "wholesalers," rather than retailers like respondents themselves, and thus do not "compete" with respondents in the resale of the goods. First, this argument is factually incorrect. United Grocers is plainly a retailer, and Hudson House, although it is primarily a wholesaler, also carries on a substantial retailing business.[34] In the latter phase of its business,

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[31] Tr. 364, 380.

[32] Tr. 461.

[33] Tr. 240, CX 96; Tr. 626, CX 214-A through 214-I.

[34] United Grocers "is a cooperative or . . . non-profit buying organization, which is owned by at the present time by some 300 odd members," tr. 626, all of whom are retail grocers. Such an organiza-

Hudson House is a retailer and thus "competes" with respondents in the resale of the goods.

In addition, however, we think respondents' contention here is erroneous as a matter of law. It rests on the premise that Section 2(d), is prohibiting promotional [fol. 86] payments unless they are made available on proportionally equal terms to "all customers *competing* in the *distribution* of such products or commodities" (emphasis added), protects only those who buy *directly* from the seller in question ("consumers"), and who "compete" with the favored buyer by reselling the *goods at the same functional level* at which that favored customer resells. Under this argument, Hudson House (in its wholesaling operation) and Wadhams & Co. (which is engaged exclusively in wholesaling), although they buy directly from Tri-Valley and/or Idaho Canning, and are thus "customers" of those suppliers within the meaning of Section 2(d), are not entitled to a proportionally equal share of the promotional allowances accorded by those suppliers to respondents because those wholesalers, in reselling the goods to retailers instead of consumers, are not "competing [with respondents] is the distribution of such products" as required by Section 2(d). Similarly, it is argued that the hundreds of retailer-customers who purchase from those two wholesalers, and resell to consumers in direct competition with respondents' Portland stores, are not entitled to a proportionally equal share of the promotional allowances in question because those retailers, having bought Tri-Valley peaches and Idaho Canning corn from the two wholesalers, rather than from Tri-Valley and Idaho Canning themselves, are not "customers" of those two suppliers within the meaning of Section 2(d). The net result of this argument is that the entire structure of "independent" food merchants—including the traditional wholesaler and his numerous,

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tion is plainly not a "wholesaler." See, e.g., American Motor Specialties Co. v. Federal Trade Commission, 278 F.2d 225 (2d Cir. 1960), and the other "buying group" cases there cited.

Hudson House owns three Portland retail grocery stores outright and its controlling stockholder, Mr. Hudson, also owns a controlling share of the stock of Oregon Piggly Wiggly, a retail grocery "chain." Tr. 238, 264, 265.

small retailer-customers—are placed completely outside [fol. 87] the pale of Section 2(d) of the amended Clayton Act insofar as their competition with the direct-buying "chains" is concerned.

The startling nature of this conclusion is even more evident, however, when it is considered that those who *would* be entitled to claim the protection of Section 2(d) in this situation are the other "chains" located in the area. Thus, in a geographical market served by, say, two direct-buying "chains," and one wholesaler with 100 retailer-customers, a supplier who gave a promotional allowance to Chain A would not be required by Section 2(d) to give it to either the wholesaler or the 100 independent retailers who buy from it, but would have to give it to Chain B. This would mean, of course, that the protection of Section 2(d) is accorded to those who presumably have the market power to take care of themselves (competing "chains"), but denied to those who, as the instant record clearly shows, need its protection very badly indeed.

We are not persuaded that Congress either intended or effected any such result when it passed Section 2(d). In the first place, such a construction goes squarely against the well-known purposes of the Act itself, namely, to give the "independent" food sellers an even break in their competition with the "chains." To hold that suppliers are free to give direct-buying retailers promotional allowances of unlimited quantity while denying all such payments to wholesalers whose retailer-customers compete with the favored "chains" is to provide the latter with a competitive advantage that could very well cause the ultimate destruction of the independents. Here, for [fol. 88] example, these respondents, in receiving price concessions amounting to as much as 33⅓%, have thereby demonstrated their *power* to exact concessions of that magnitude. They should have no difficulty in persuading those cooperative suppliers to grant them the same concessions in the form of a genuine promotional allowance. (A seller should be far more eager to *buy* promotional services than to *give* lower prices.) And in an industry where net profit margins at both the wholesale and the retail levels are frequently as low as 2%, little argument

should be required to demonstrate that a 33⅓% advertising or promotional allowance granted to one customer but denied to another could be a decisive factor in the competitive struggle between the favored and non-favored distribution systems. We think this is precisely the kind of unfairness that Section 2(d) was designed to prevent.

Aside from the question of Congress' intent in the matter, we see nothing in the words of that provision to support the proposition that wholesalers whose retailer-customers compete with direct-buying "chains" are not entitled to a fair share of the promotional allowances received by the latter. As noted, Section 2(d) declares that such allowances are unlawful unless they are made available, on proportionally equal terms, to "all other customers competing in the distribution of such products." These wholesalers, like respondents themselves, buy directly from the discriminating suppliers and are, therefore, unquestionably "customers" of those discriminators. And we think that, insofar as those wholesalers resell to retailers who, in turn, resell to consumers in competition [fol. 89] with respondents, the wholesalers are competing with respondents in the "distribution" of the goods in question. It is true, of course, that only the retailer-customers of these two wholesalers compete with respondents in the direct resale of the goods to consumers. But the statute speaks of competition in the "distribution" of the products, not merely of competition in their "resale." These wholesalers, through their numerous retailer-customers, are seeking exactly the same consumer dollars that respondents are after. Every time an independent retailer loses a sale to respondents, the wholesaler who supplied that independent retailer suffers a loss of volume by just that much. And if all of the independent retailers in Portland should close their doors, these wholesalers would necessarily be finished in that market.

By the same token, these 100-plus independent Portland retailers depend entirely on those two wholesalers for such competitive equality, vis-a-vis the direct-buying chains, as the independent retailers are able to secure. Any competitive disadvantage experienced by the wholesaler himself in buying goods in competition with the chains is necessarily passed on to its retailer-customers.

If it pays more for a given product than respondents pay, the price it charges the independent retailers will naturally reflect that higher price. (One of these wholesalers, Wadhams & Co., actually sells on a "cost-plus" basis, i.e., it charges its retailer-customers the price it pays for the goods, plus a fixed percentage of that amount to cover its other costs and its profit margin.) And if the wholesaler is denied promotional allowances received by respondents, it obviously cannot pass them on to its retailer-[fol. 90] customers or use them for the benefit of those customers. In such a market context as this, we think it ignores economic reality to say that these two wholesalers are not "competing" with respondents in the "distribution" of these products.

In this connection, it should be noted that, while "competition" in one form or another is the concern of each of the several subsections of the Act, there is no universal definition of that term that can be applied mechanically to all of its provisions. For example, "competition," as used in Section 2(b)'s "meeting competition" proviso, refers *solely* to competition with the discriminating *seller*, i.e., to "primary-line competition. Federal Trade Commission v. Sun Oil Co., 9 L.Ed. 2d 466 (January 14, 1963). None of the other subsections are so limited. Hence the scope of "competition" embraced by one of the Act's provisions is not necessarily controlling in the context of another section.

Analysis of those other sections can, however, provide most helpful analogies. Thus, in the area of *price* discrimination under Section 2 (a), it has long been settled that suppliers are guilty of discrimination when they charge a retailer a lower price than they charge "wholesalers whose customers compete with such retailers." Federal Trade Commission v. Morton Salt Co., 334 U. S. 37, 55 (1948). While this section, unlike Section 2 (d), specifically describes the several levels of "competition" to be protected (competition with the giver and the receiver of the lower price, "or with customers of either of them"), that description sets forth not the elements of a price discrimination—which "is merely a price differ-[fol. 91] ence," Federal Trade Commission v. Anheuser-

Busch, Inc., 363 U. S. 536, 549 (1960)—but the "effects" that must appear before the "discrimination" will be deemed harmful enough to warrant the laying on of the laws restraining hand. Hence that language, although it supported the Court's conclusion in Morton Salt, supra, that the "difference" between the price charged the favored retailer and the nonfavored wholesalers amounted to a price "discrimination," was not essential to it. The same result would doubtless have been reached if the draftsmen of Section 2(a), while retaining its present description of the offense of "discrimination," i.e., "discriminate in price between different purchasers," had made it a per se provision like Section 2(d) and thus omitted completely all reference to the three levels of competition at which injury can occur.

Thus, the omission of such "effects" language from section 2(d) had no significance in determining whether or not its terms are violated by favoring a retailer over a wholesaler. That qualifying phraseology was left out of that provision because, and only because, Congress had determined that the offense described therein, as one of the "'secret' discriminations," Federal Trade Commission v. Simplicity Pattern Co., Inc., 360 U. S. 55, 68 at note 12 (1959), was an appropriate subject for outright prohibition without regard to whether or not it might result in discernible competitive ill-effects. Whereas the "price discrimination provision is hedged with qualifications," the "proscriptions of these three subsections [Sections 2(c), 2(d), and 2(e)] are absolute." Id., 64, 65. As to Congress' purpose in giving less considerate treat-
[fol. 92] ment to those "secret" discriminations, including the withholding of the affirmative defense of "cost justification" and, presumably, the omission of the requirement of a showing of adverse competitive effects, it was apparently believed that discrimination-prone sellers would thereby be "forced to confine their discriminatory practices to *price* differentials, *where they could be more readily detected*. . . ." Id., 68 (emphasis added).

This Congressional objective would be frustrated, of course, if it should be held that promotional allowances accorded to direct-buying retailers need not be given to

wholesalers whose retailer-customers compete with these favored retailers. Such an interpretation of Section 2(d) would be a definite encouragement to the "chains" to seek their discriminatory advantages in this "secret" form, rather than in the more "readily detected" form of a *price* discrimination. Indeed, the instant record illustrates that proposition. These respondents, as discussed above, vigorously contend that the 33⅓% price concessions involved herein were not discriminatory price concessions cognizable under Sections 2(a) and 2(f), but merely "promotional allowances" actionable only under Section 2(d). If that argument should be accepted, and if their further contention that promotional allowances accorded to them need not be made available to the wholesalers in question should prevail, the suppliers involved herein would be left free to give respondents promotional allowances of unlimited amounts (e.g., 33⅓% of their purchases from the "participating" suppliers), while giving these wholesalers nothing.

[fol. 93] We cannot accept an interpretation that flies so squarely in the face of not only the plain purposes of the statute, but of the very terms of the provision in question. It seems to us that these two wholesalers, insofar as they resell to independent retailers sitting alongside respondents' thirteen Portland supermarkets, are "competing" with respondents in the "distribution" of the goods in question in every meaningful sense of those two terms. Accordingly we feel constrained to reject the contrary conclusions reached by this Commission in Liggett & Myers Tobacco Co., Inc., 56 F.T.C. 221, 250-252, and to accept, instead, the views expressed in the dissenting opinion of Commissioner Kern in that case, 56 F.T.C. at 253, et seq., and of the court in Krug v. International Telephone & Telegraph Corp., 142 F. Supp. 230, 236 (D.N.J. 1956). In that case it was held squarely that a "violation of Section 2(d) may occur when a manufacturer gives a retailer an allowance not given to a wholesaler whose customers compete with such retailer."

Respondents contend further, however, that the retailer-customers of the two wholesalers in question do not, as a matter of fact, compete with respondents in the re-

sale of Tri-Valley peaches and Idaho corn. The argument here is the one we rejected in Tri-Valley Packing Association, Dkts. 7225 and 7496, opinion of the Commission, May 10, 1962, namely, the contention that a violation of Section 2(a) or Section 2(d) cannot occur unless a specific quantity of a discriminating seller's goods, e.g., particular cans of peaches and corn, can be "traced" all the way from the discriminating seller to the shelves of spe-
[fol. 94] cific retailers who compete with the favored buyer, and that such "tracing" is here rendered impossible by the fact that these non-favored wholesalers have "commingled," under their private labels ("Hudson House" and "Wadhams"), cans of Tri-Valley peaches and Idaho corn, with peaches and corn bought from other suppliers. The net result, of course, is that cans of peaches and corn labeled "Hudson House" and cans of corn labeled "Wadhams" can be physically found sitting on the shelves of retailers who compete with respondents, but it cannot be said with absolute certainty that any particular one of those cans was actually packed by Tri-Valley, Idaho Canning, or any other specific supplier.

We do not think, however, that any such mathematical precision is required. True, these wholesalers did not resell the entire amount of their purchases from Tri-Valley and Idaho Canning in the Portland trading area, and some of the peaches and corn which they did resell to retailers in that area had been acquired from other suppliers. But the possibility that *all* of the peaches and corn purchase by those two wholesalers from those two suppliers just happened to find their way into other areas, by the operation of sheer chance, is too remote to be worthy of consideration. The fact remains that Hudson House's purchases from Idaho, for example, amounted to roughly the same as respondents' own purchases from that supplier,[35] and that a substantial part of Hudson House's total volume of sales were made to Portland retailers, all of whom compete with one of respondents'
[fol. 95] thirteen stores. Thus, a list of Hudson House's retailer-customers admitted into evidence[36] shows that

[35] Tr. 534.

[36] CX 67-A through 67-Z-5.

it has more than 100 such customers located in the Portland area. Four of these testified that they resold "Hudson House" peaches and corn in direct competition with respondents' stores.[37] Further, Hudson House supplies the Oregon Piggly Wiggly chain, which sells through some twenty Portland retailers,[38] and United Grocers, which has more than 100 retailer-members in Portland.[39] The other wholesaler in question, Wadhams & Co., resells to about forty retail grocers in the Portland area.[40]

In view of the fact that respondents claim to have "one [supermarket] in every neighborhood" and admit that "we're competing with any food store" in the area,[41] we think the existence of competition between respondents on the one hand and the retailer-customers of the non-favored wholesalers on the other, in the resale of Tri-Valley peaches and Idaho corn, has been established. Those two wholesalers, therefore, were entitled to a proportionally equal share of the promotional allowances given to respondents.

Nor is there any merit in respondents' argument on the issue of "like grade and quality." Here they point [fol. 96] to the fact that three of the non-favored customers named by the examiner bought from the suppliers in question under private brand labels and that it is therefore impossible to determine whether or not the products were actually the same. They concede that the invoices received by themselves on the one hand and by these non-favored buyers on the other show precisely the same manufacturer style numbers or other identifying data,[42] but insist that this is not proof of like grade and

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[37] Tr. 548, 560, 613, 792, and 821.

[38] Tr. 240; CX 96.

[39] Tr. 626; CX 214-A through 214-I.

[40] Tr. 170; CX 68-A and 68-B. One testified that his store was located "directly across the street from Fred Meyer." Tr. 567.

[41] Tr. 14.

[42] Thus, Tri-Valley's invoices to both respondents and Hudson House described the canned peaches being sold as "cho hvy hvs yc peaches" (choice heavy syrup sliced or halved yellow cling) packed

quality. We do not agree. A supplier's use of identical descriptive data on invoices to favored and non-favored customers constitutes probative evidence and establishes, prima facie, the fact of like grade and quality. Respondents had every opportunity to show, if they could, that this evidence was inaccurate. The mere fact that the goods bear the private brands of the respective buyers is clearly insufficient to rebut the inference of identity that is raised by the similarity of supplier-descriptions.

[fol. 97] II.

As noted above, the payments received by respondents from the suppliers who participated in the "coupon book" promotion, insofar as they exceeded the $350 intended for and actually used in the promotion of those suppliers' goods, constitute price concessions cognizable under Sections 2(a) and 2(f). The record thus shows the following price "discriminations": (1) Hudson House did not receive the 33⅓% reduction in price on canned peaches that respondents received from Tri-Valley during the one-month period of their 1957 coupon book promotion (which amounted to aggregate concessions of $4,814); (2) neither Hudson House nor Wadhams & Co. received the 33⅓% price concessions that respondents received from Idaho Canning on their purchases of canned corn during the one-month period of their 1957 coupon book promotion ($2,585.41 in amount); (3) Roberts Brothers, a Portland department store, paid the regular price of $1.65 per dozen for Cannon Mills' fingertip towels while respondents were buying them at the special low price of $1.55 per dozen during the one-month period of their

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in cans "24/2½" in size. Idaho Canning's invoices to respondents, Hudson House, and Wadhams described the canned corn in question as "Fcy cs" (fancy cream style), in "24/303" can size. Burlington Industries' invoices to respondents and to Lipman, Wolfe & Co. designated the nylon hosiery as "style" numbers "603," "660M," "515," etc. See CX 42, et seq.; CX 48, et seq.; CX 115, et seq.; and CX 141, et seq.

In addition, the independent retailers who competed with respondents had no doubts on the like grade and quality issue. See, e.g., Tr. 796, 816.

1956 coupon book promotion (total price concession of $400); and (4) Lipman, Wolfe & Co., another Portland department store, did not receive the 50¢ to 94¢ per dozen reduction in price on nylon hose that respondents received during the one-month periods of their 1957 and 1958 coupon book promotions (total price concessions amounting to $1,350 in 1957 and $1,450 in 1958). The fact that these non-favored buyers paid the regular price, sans any concessions, is voluminously documented by invoices in the record showing that these buyers paid, dur- [fol. 98] ing the various one-month periods in question, the same price that respondents themselves paid during the remaining eleven months of each year. Respondents' argument that the prices appearing on invoices are not "evidence" of the price actually paid is rejected for the same reason discussed above in connection with their argument that "style numbers" on invoices are not evidence of the grade and quality of the goods, namely, that these documents are records kept in the ordinary course of business and are thus prima facie evidence of the business facts they purport to show. Respondents had every opportunity to submit evidence that the prices shown on the invoices had been subsequently varied by some of the methods they suggested ("rebates," etc.). In the absence of such rebuttal evidence, it must be held that respondents have conceded the accuracy of those figures.

Further, the fact that the prices appearing on the invoices to these non-favored customers in September and October are the same as those paid by respondents themselves during other months in the year is itself a persuasive indication that those prices are accurate. In addition, however, the instant record includes (1) the testimony of the broker who handles Tri-Valley peaches and Idaho corn in the Portland area to the effect that, at any given time, all purchasers are charged the same price;[43] (2) the testimony of the non-favored buyers that

[43] "Q. Now, Mr. Larsen, to your knowledge, has there always been the same price charged Fred Meyer, Hudson House or Wadham's for any particular item by Idaho Canning?

"A. You mean the same item?

"Q. Of the same item, same grade and quality?

[Footnote continued on page 71]

[fol. 99] they paid the "regular," or higher, price during the pertinent one-month periods of respondents' coupon book promotions;[44] and (3) the testimony of respondents that, after the end of each of the one-month periods of the coupon book promotions, they once again paid the respective suppliers' regular prices.[45] Only one of the four non-favored buyers named by the examiner received a price concession during the periods in question. This was Hudson House, who received the sum of $100 on October 11, 1957, from Tri-Valley, in connection with Hudson's 50th Anniversary Sale. Although this sum was designated as a "promotional allowance," the record is plain that no "services" were expected of or given by Hudson in return therefor,[46] and that it was, in effect, an arbitrary sum that can be treated as a price concession. As such, there is no question of "proportional" treatment. Instead, the question is whether or not that $100 gift had the effect of reducing the price paid by Hudson, during the one-month period of respondents' 1957 coupon book promotion (September 25 through October 23), by 33⅓%, that is, to the same discriminatory low price that respondents were themselves paying at [fol. 100] that time. While the record is not clear as to the volume of Hudson House's purchases during that period as compared to respondents' own purchases, there is nothing to suggest a disparity so great that a $100 concession to Hudson would yield the same low price as a $4,814 concession to respondents.

III.

Respondents' contention that these discriminations in their favor pose no threat of injury to competition is patently without merit. The testimony showed that com-

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[43] [Continued]
"A. Yes.
"Q. Same can size?
"A. Yes, at the same time." Tr. 124.

[44] See, e.g., Tr. 177-180 (Wadhams); Tr. 370-374 (Roberts Brothers); Tr. 445-461 (Lipman, Wolfe & Co.).

[45] Tr. 428.

[46] Tr. 644-649.

petition in the food industry is keen; that the average retail grocery store carries approximately 2,500 to 6,000 separate items; that a price differential of ½ of 1% will swing a retailer from one supplier to another; that the net profit of some retailers is as low as 2%;[47] that the profit margin at the wholesale level is about 2%;[48] that [fol. 101] the 33⅓% price concession respondent received from Tri-Valley and Idaho Canning and passed on to consumers during their coupon book sales resulted in a retail sales price that was below the price at which other retailers *bought* those items (from the non-favored wholesalers);[49] and that a price differential of 1¢ will switch some consumers from one grocery retailer to another.[50] In such a market context, the probable effects

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[47] "Q. . . . How important is 2 per cent on the retailing level?

. . .

"A. Sometimes it represents the man's profit.
"Q. For the entire year?
"A. Yes" Tr. 140. See also Tr. 242,

[48] A representative of Hudson House, a wholesaler, testified:

"Q. As a matter of fact, isn't that [2% cash discount] the difference between profit and loss at the end of the year?

. . .

"A. It could be." Tr. 141.

Another wholesaler, Wadhams, testified as follows:

"Q. Mr. Durkheimer, does Wadham's take advantage of the 2 per cent discount for prompt payment offered by Idaho Canning?
"A. Yes.
"Q. Why?
"A. I believe the 2 per cent represents more than the net profit structure of any wholesale grocery operator that I'm familiar with. . . ." Tr. 172.

[49] "Q. Can you afford to meet that competition, Mr. Jones?
"A. No, sir. I can't even buy it at that." Tr. 555.

Another retailer testified:

"A. We couldn't sell them at the same price.
"Q. Would you explain that?
"A. As they were costing as much if not more than they—the peaches were being sold for [by respondents]." Tr. 797.

[50] "A. Many customers are price conscious and one penny difference in the price causes them to go blocks to pick up the item." Tr. 800.

of a price discrimination of 33⅓% seems obvious enough. As the Supreme Court said in the Morton Salt case in response to the argument that competitive injury could not result from discrimination in such an insignificant item as salt:

> There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect [fol. 102] a merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. Since a grocery store consists of many comparatively small articles, there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store.[51]

In the instant case, the two grocery articles involved—canned peaches and corn—were shown to have been the "fastest moving" items in their respective lines (canned fruits and vegetables, respectively),[52] and that price differentials on those items were thus particularly significant, i.e., consumers who go to a competitor's store to take advantage of a bargain price on a staple like peaches or corn will buy other products there, also, thus magnifying the losses of non-favored buyers.[53]

[fol. 103] The evidence was equally clear as to the effect of respondents' coupon book program on their competitors' sales of the other products involved herein. Thus, a

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[51] Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, 49 (1948).

[52] Tr. 552, 569, 617, 822.

[53] "Q. . . . (W)ill you tell us whether or not that effects your sale of other grocery products in your store?

"A. Yes, it does.

"Q. Would you explain?

"A. A customer would be interested in some of the coupon items so they would do their other shopping at the same time. So you would lose their business for that time that the coupon book was on." Tr. 797.

representative of one of the non-favored department stores testified that, whereas respondents' "coupon" selling price for Burlington Industries' nylon hose was roughly 66¢ per pair (3 pairs for $2), his store was paying about 64¢ per pair *f.o.b. the factory* for the same hose at the same time. He stated that he could meet respondents' "coupon" price, of course, but that "I wouldn't make any money at it." [54]

IV.

There remains the question of whether respondents "knowingly induced" those suppliers to violate Sections 2(d) and 2(a) of the amended Clayton Act, or whether respondents were merely "unsuspecting recipients" of the illegal promotional allowances and price discriminations described above. Automatic Canteen Co. v. Federal Trade Commission, 346 U. S. 61 (1953).

Because much of the evidence bearing on respondents' "knowledge" of the illegal nature of these concessions is relevant to both the Section 5 and the Section 2(f) charges, the two will be discussed together. However, it should be noted at the outset that there is a difference in the "knowledge" requirements of the two. Under Section 2(f) the buyer is exonerated unless it is shown that he either knew or should have known not only that he has received a discriminatory price, but also that the discrimination cannot be justified under any of the available [fol. 104] defenses. Automatic Canteen Co. v. Federal Trade Commission, supra. A Section 5 case charging a buyer with knowingly inducing unlawful promotional allowances, because it derives its essential character from Section 2(d), a so-called "per se" provision, requires no showing of competitive injury and does not permit a defense based on the cost justification provision of Section 2(a). While the "meeting competition" defense is available in such a case, Exquisite Form Brassiere, Inc. v. Federal Trade Commission, 301 F. 2d 499 (D.C. Cir. 1961), cert. denied, 369 U. S. 888 (1962), it has not been asserted here. Hence the only "knowledge" that is spe-

[54] Tr. 449-451.

cifically at issue in the Section 5 aspect of the instant case is these respondents' knowledge, or their possession of fact sufficient to lead reasonably prudent businessmen to believe, that the promotional allowances they received have "not been made proportionally available" to their competitors. Grand Union Co. v. Federal Trade Commission, 300 F. 2d 92, 100 (2d Cir. 1962). See also American News Co. v. Federal Trade Commission, 300 F. 2d 104 (2d Cir. 1962), and Giant Foods, Inc. v. Federal Trade Commission, 307 F. 2d 184 (D.C. Cir. 1962).

Since respondents' "coupon book" program gave rise to not only promotional allowances cognizable under the Section 5-2(d) charge, but to the price concessions challenged under Section 2(f), their knowledge of the discriminatory nature of this program is of course pertinent to both phases of the case. On the latter charge, respondents plead, first, a complete want of knowledge of the several elements that go to make up a prima facie case of seller-liability under Section 2(a). Secondly, they [fol. 105] contend that they had no reason to believe any price concessions received by them under their "coupon book" program could not be "cost justified" by the "participating" suppliers.

On the first point, respondents profess, as the following captions from their brief show, a most extraordinary ignorance of the market in which they operate:

> A. Respondents Did Not Know That Competitors Purchased Products from the Same Supplier
>
> B. Respondents Did Not Know That Their Suppliers Sold Goods of Like Grade and Quality to Other Customers Who Competed with Them in the Portland Area
>
> C. Respondents Did Not Know That the Prices at Which They Purchased Were Lower Than Prices Paid by Their Competitors
>
> D. Assuming Respondents Received Lower Prices, They Did Not Know That Such Prices Were Not Cost Justified [55]

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[55] Respondents' brief, pp. 6, 7, 9, and 13.

The record, however, suggests that respondents have a somewhat more lively interest in the activities of their competitors than these denials would lead us to believe. Indeed, the testimony of their own officials demonstrates that they took the most vigorous steps to gather trade information. They "monitor" all newspaper advertisements by all grocery retailers not only in the Portland area, but throughout the entire United States;[56] they [fol. 106] "shop" competitive stores, checking to see if the price at which the goods are actually being sold "corresponds with the advertised price";[57] they actually purchase items in competitive stores and "bring it back to the office for further checking and testing";[58] and each and every one of their various buyers is personally charged with the duty of making these "checks" on the prices of competitors who sell goods competitive with those he buys.[59]

Respondents concede that they "study market conditions" to see that the price they pay their suppliers is "right."[60] This is accomplished by reviewing price "bulletins" distributed by the various suppliers them- [fol. 107] selves and by the brokers who serve those sup-

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[56] "Q. Do you monitor these newspapers daily?

"A. We monitor the food ads whenever they appear in the paper." Tr. 95, et seq.

The monitoring of food ads on a national scale is accomplished by subscription to a "newspaper clipping service" that provides them with advertisements run by retailers in each metropolitan area throughout the country. Tr. 896.

[57] Tr. 894. This is done "regularly, two, three, four times a week. . . ." Tr. 895.

[58] Tr. 894.

[59] "Q. And do your twenty-five buyers under your supervision do that with respect to their particular items?

"A. As a regular practice, this is a part of their duty.

"Q. I see. They check the local prices then on these various promotional efforts, is that right?

"A. That's correct, and they also check the prices outside the area by advertising." Tr. 894.

[60] Tr. 94.

pliers in the area,[61] and by personal contact with the broker. It appears that they had a "pretty close contact" with the Portland broker who handles Tri-Valley peaches and Idaho corn.[62] In one instance (which will be discussed in greater detail hereafter) this broker assumed the responsibility of entering Idaho Canning in respondents' 1957 coupon book promotion without bothering to inform Idaho. The latter initially repudiated respondents' invoice for $2,935.41 (for the "page" in the book, and "redemption" of the coupons) on the ground that his broker had no such authority,[63] but was later per- [fol. 108] suaded to pay it (in free goods) "in order to placate the thing."[64] This broker, of course, as the conduit through which all transactions between the two suppliers (Tri-Valley and Idaho) and their Portland customers (including respondents and the two non-favored customers, Hudson House and Wadhams) moved, was thoroughly familiar not only with the prices being charged to each but with the "allowances" given. (The broker receives a copy of all invoices sent by those suppliers to respondents and the non-favored buyers, and his commission is computed on the basis of the invoice price.) And

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61. "Q. . . . How do you go about getting the best sort of a price for Fred Meyer?

"A. Oh, through a review of the bulletins that are put out by the companies, a comparison of what their prices are.

"Q. Do you keep posted with these bulletins?

"A. Yes.

"Q. How frequently do the bulletins come from Tri-Valley?

"A. Generally whenever they have a change in their list price." Tr. 92.

62 "Q. Now, how do you go about it, about insuring that Fred Meyer gets the best price?

"A. Through personal contact with your broker or representative of the company who might be in the area.

. . .

"A. Well, strictly through contact with the brokers and representatives of the companies.

"Q. Well, do you have a pretty close contact with this broker, Mr. Larsen?

"A. Yes, sir." Tr. 93-94.

63 Tr. 508.

64 Tr. 523.

his thorough familiarity with the "coupon book" promotion is demonstrated by the fact that he was sometimes physically present when respondents made the initial proposal to the supplier. Indeed, a representative of Tri-Valley testified that, if his company had offered promotional allowances such as the $350 for a "page" in respondents' coupon book promotion to respondents' competitors, the offer would have been made through the broker.[65]

Further, respondents admittedly relied upon the broker to see that they always got the "best" price from their suppliers:

> "Q. Now, if a competitor is advertising at a lower price than Fred Meyer's advertised price, what steps do you take, if any?
>
> "A. If it's a drastic reduction, we may call the [fol. 109] broker at the time to find out if there's something going on that we haven't been informed of.
>
> "Q. And if you find something that you haven't been informed of?
>
> "A. Well, we have a few words. We feel that it's the broker's and the company representative's responsibility to keep us up to date on prices and price structures. If they don't do it, then they are certainly falling down on their job. . . ." Tr. 96.

The broker himself testified as to his thorough familiarity with the prices charged by his principals to their customers;[66] to the fact that he personally notifies them

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[65] "Q. Do you recall who would make the offer to these competing customers, if any?
"A. Our representative.
"Q. Who?
"A. Kelly-Clark Company . . ." Tr. 639.

[66] "Q. Mr. Larsen, are you familiar with the prices charged Fred Meyer by Tri-Valley on particular items?
"A. Yes.
"Q. That's your business, isn't it?
"A. That's right.
"Q. Are you also familar with the prices charged Hudson House by Tri-Valley for any particular item?
"A. Yes, that is, if I make the sale, and I undoubtedly do." Tr. 110.

of supplier-prices;[67] and to the fact that prices are a matter of "general trade knowledge."[68]

[fol. 110] In view of these many sources of trade information available to, and obviously utilized by, these respondents, we think it strains credulity to suppose that they were unaware of the fact that they had competitors in Portland who resold products acquired from the suppliers in question. Thus, respondents' own "shopping" of competitive stores could not have failed to inform them that their competitors, including Piggly Wiggly and United Grocers, were selling Philip Morris tobacco products. The same is true of the Cannon Mills fingertip towels sold by Roberts Brothers, a department store located only two or three blocks from respondents' nearest store.

In regard to the items sold by them and their competitors under private brand labels, the curtain of secrecy is not so impenetrable as respondents would have us believe. Thus, respondents bought Burlington Industries' nylon hose under respondents' own private label, "Rose Dawn," while Lipman, Wolfe & Co., a department store, bought the same hose from Burlington Industries under Lipman's own private label, "Waverly." From this fact, respondents would have us believe that their professional shoppers and highly skilled buyers would be completely in the dark as to where Lipman was buying its nylon hose. Lipman's representative, however, testified that he regarded it as "generally common knowledge" that most retailers handle Burlington hose.[69]

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[67] "Q. Do you personally keep your buyers notified?
"A. Oh, yes.
"Q. Do you call them?
"A. Usually telephone them too, along with a bulletin." Tr. 116.

[68] "Q. Is there a general trade knowledge regarding prices of certain commodities?
"A. Oh, yes.
"Q. Do you discuss market conditions with your buyers?
"A. Yes, definitely." Tr. 116.

[69] "Q. Do you know who else sells Burlington hoisery products in this immediate area, the metropolitan area of Portland?
"A. Well, I'm quite clear now that Fred Meyer does; Meier

[fol. 111] As to the other two private brand products involved (Tri-Valley peaches and Idaho corn, which are sold to respondents and the two non-favored buyers under their respective private labels, "My-Te-Fine," "Hudson House," and "Wadhams"), we think it most unlikely that respondents, with their admitted interest in making sure that they received the "best price," would have been content to operate on the blind assumption that they were the only purchasers of Tri-Valley peaches and Idaho corn in the Portland area. In order to be sure that they were getting the "best" price, they must necessarily have known who else was buying and what they were paying. Respondents' vigorous intelligence network eloquently attests to their quite natural desire to know these things; if they did not succeed in learning them, it was because they lacked the *power*, not the inclination.

On this point, we have already commented on respondents' "close contact" with the Portland broker who [fol. 112] handles the products of both Tri-Valley and Idaho, and the fact that he participated in the initial negotiations between respondents and his principals (Tri-Valley and Idaho) for the 1957 "coupon book" promotion.[70] There is also the fact that his brokerage earnings depend upon the volume of his sales, and that respondents' coupon book program obviously increased the volume of their purchases through him. (Tri-Valley's annual

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& Frank, I think, on occasion have, but I would presume that most retailers, including many specialty stores and supermarkets, very often would have sold merchandise that would have been purchased from Burlington Hoisery Company.

. . .

"Q. But you know that they handle Burlington products anyway?

"A. I would think that would be generally common knowledge.

"Q. And that would also be common knowledge with respect to Olds & King and the other department stores?

"A. I would think that most of them use an important resource such as Burlington Mills." Tr. 461-462.

[70] Tr. 60, 81. Respondents received Tri-Valley's "actual okay to go ahead" from the broker (Tr. 62); Idaho's alleged "agreement" to participate in that 1957 coupon book was communicated to respondents by the broker (Tr. 82); and Tri-Valley's participation in the 1958 coupon book program was initiated by "verbal contact" with the broker (Tr. 70).

sales to respondents are about $150,000.[71]) We think we would be ignoring the commercial facts of life if we assumed that these respondents, notwithstanding their possession of this kind of buying power and their "close contact" with a broker having a pecuniary interest in seeing that it was directed to him and his principals, were nevertheless unable to learn the names of their competitors, the prices they were paying, or the promotional allowances they were or were not receiving. We think it quite significant here that respondents, in annual sales volume, are much larger than either of these suppliers. (In 1957, respondents' sales exceeded $40 million, as compared to $22 million for Tri-Valley and only $1,200,000 for Idaho Canning.)

[fol. 113] The real extent of respondents' purchasing power and the closeness of their dealings with the broker in question is nowhere so well illustrated as in the incident of Idaho Canning's involuntary "participation" in the 1957 coupon book promotion. In accordance with their usual practice of soliciting supplier-participation early in the year so as to have all 72 "coupon" agreements firmed-up well in advance of the September-October sales period, respondents first approached Idaho Canning during the January 1957 convention of the National Canners Association, in Chicago. At that time, Idaho was unable to make up its mind as to whether or not it wanted to "participate." No contract was signed, no agreement was reached, and nothing was done or said by Idaho to lead respondents to believe that it was agreeing to participate. That was the last Idaho heard of the matter until the Fall of 1957 when it learned that a "page" in respondents' 1957 coupon book had featured three of Idaho's cans of corn for the regular retail price of two and Idaho itself received, from respondents, an invoice stating that it owned them a total of $2,935.41 ($350 for "1 Full Page in Book" and $2,585.41 for "21367 Coupons Redeemed @ .121").[72] Idaho promptly "denied the invoice and returned it to Fred Meyer Company.[73]

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[71] Tr. 525.

[72] Tr. 506-508; CX 39.

[73] Tr. 508.

Respondents apparently made no protest to this, and continued to buy from Idaho. But they subsequently deducted, from one of Idaho's invoices to them for goods sold and delivered, the exact amount of $2,935.41. Idaho, in [fol. 114] turn, protested this high-handed treatment, and respondents returned the money to them.[74] But a few months later—on January 29, 1958—Idaho yielded and shipped respondents $2,935.41 worth of "free" goods.[75] Idaho's respresentative characterized this payment in various ways: as "an adjustment or a compromise donation to the amount of $2,935 of merchandise to replace their claim of goods given in this promotion";[76] as a payment made "in order to placate the thing";[77] as an "adjustment in view of the fact of the promotion";[78] and as "the justification of satisfying a customer in the amount that they had been out for advertising situation." The latter was explained as follows:

> "Q. What advertising situation, Mr. Moss?
> "A. The one we're talking about?
> "Q. Which one, sir? You state.
> "A. His fall promotion."[79]

When Idaho finally capitulated, it did this through its broker, too.[80]

[fol. 115] However, any inclination to regard respondents as unknowing beneficiaries of the broker's unauthorized act of entering his principal in the coupon book is

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[74] "Then I immediately informed them that they had no right to do it, or through the broker, they had no right to do it, and we wouldn't accept it that way, and they in turn sent us the balance of the money. They sent it—returned this to us, $2,935." Tr. 511.

[75] CX 206-210.

[76] Tr. 512.

[77] Tr. 523.

[78] Tr. 537.

[79] Tr. 524.

[80] ". . . (W)e told him [the broker] to go ahead and figure the amount of cases in the transaction and we'd ship it to him, and that's exactly what happened." Tr. 538.

discouraged by respondents' less than candid attempt to persuade the hearing examiner that there was no connection between the $2,935 invoice they sent Idaho for its "participation" in the coupon book promotion in the Fall of 1957 and Idaho Canning's ultimate payment of $2,935.41 on January 29, 1958. Respondents' counsel argued that it was "not in connection with this coupon book promotion"; that it did "not involve merchandise sold during the year 1957"; that it was "a separate transaction"; that "the witness has testified that this was a voluntary payment that he made"; that "it was not solicited at all," that it "was during the following year"; that "it has nothing to do with the [coupon] book"; that, although both transactions involved the precise sum of $2,935.41, "one is merchandise and one is money, and one is in one year and the other was in the following year"; that "the witness has testified that he made a *voluntary contribution* in merchandise to Fred Meyer, and this is this transaction which was not solicited on the part of Meyer or any employee"; that "Fred Meyer paid the full purchase price, the full invoice price, and that that transaction was settled and terminated"; and that evidence of the payment was objected to "as being immaterial, irrelevant and having no bearing on our coupon book sales. . . ." [81]

In the face of the witness' clear testimony that the January 1958 payment was made to "satisfy" Fred Mey-
[fol. 116] er's claims for the costs they had incurred in promoting Idaho corn in their "fall promotion," [82] the foregoing objections were frivolous in the extreme. Counsel ultimately withdrew them.[83] On "cross-examination," however, he continued substantially the same argument by eliciting from the obviously friendly supplier-witness testimony that was patently unworthy of belief.[84]

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[81] Tr. 509-531 (emphasis added).

[82] Tr. 524.

[83] Tr. 531.

[84] "By Mr. Mead: All right. Now, taking into account these adjustments that you made in the following year by the free merchandise to Fred Meyer, were the prices and promotional allowances charged and allowed to the Fred Meyer Company

Respondents' sole answer to all of these circumstances is that, since none of the suppliers in question came right out and told them that the price concessions and promo-
[fol. 117] tional payments were not being given or offered [85] to other buyers, they had no reason to suspect that they were inducing or receiving anything illegal. The trouble with this argument is that a buyer cannot—

> plead want of knowledge as a successful defense to charges in a complaint such as the instant one, in circumstances where it appears that such want of knowledge on the buyer's part was culpable. . . . This being so, the question becomes whether or not, upon the record as a whole, the Commission introduced enough evidence to show that [respondent], at the time it induced and received the payments from its suppliers, possessed information sufficient to put upon it *the duty of making inquiry* to ascertain whether the suppliers were making such payments available on proportionally equal terms to [respondent's] competitors. Giant Foods, Inc. v. Federal Trade Commission, supra, 307 F. 2d at 187 (emphasis added).

We think the respondents in the instant case possessed more than enough "information to put upon [them] the

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substantially in line with those prices and those allowances charged and given to Hudson House in the Portland area, considering all of the elements?"

"A. Yes, that's correct, sir. I so testified."

. . .

"Hearing Examiner Kolb: Did you give the Hudson House $2,935.41?"

"The Witness: No, that wasn't the question he asked me. He asked me on promotional allowances on the invoice price."

. . .

"Hearing Examiner Kolb: Well, Mr. Moss, you did not give Hudson House $2,400 (sic) allowance at the same time you did Meyer?"

"The Witness: No, sir." Tr. 538-540.

[85] "Q. Were you advised by Burlington or their representative, either directly or indirectly, that this promotional allowance was not available to other customers on a proportionately equal basis?"

"A. I was not." Tr. 435.

duty of making inquiry" as to whether or not their participating suppliers were taking steps to make those promotional payments available to other buyers. First, it was the respondents, not the suppliers, who originated or initiated the programs under which the concessions were [fol. 118] granted. When they conceived these plans and presented them to their suppliers, respondents thereby began to receive payments other buyers necessarily could not have been enjoying at that moment. Thus, in order to make the same concessions available to all other buyers, the suppliers in question would have therefore had to initiate, subsequent to respondents' solicitation, a program based on, or including as one of its alternative features, the arrangement with respondents. We think the law is plain that a buyer who initiates a promotional service and induces his supplier to pay him for performing it has possessed himself of "information sufficient to put upon it the duty of making inquiry to ascertain whether the suppliers were making such payments available on proportionally equal terms to [his] competitors." This is so because the natural reaction of a supplier who has yielded to the demands of one of his larger customers is not to further lighten his purse by making the same payments to hundreds of others, but to minimize his outlay by concealing the fact that he has made any such payment at all. A powerful buyer does not go to a seller with hat in hand asking to be given something that is "proportionally equal" to what the smaller buyers are getting; he wants something *in addition* to what the others are receiving. The result is almost invariably a situation in which the initiating buyer continues to receive the same promotional allowances all other buyers are receiving, plus the new one he has conceived himself. Thus, in the Giant Foods case, supra, that respondent had solicited its suppliers' participation in a promotional plan that expressly pro- [fol. 119] vided: "This contract does not alter or replace currently existing advertising or merchandising agreements between Giant Food Department Stores and participating manufacturers." The court, relying on this as one of the factors that showed "Giant knew that it was the beneficiary of disproportionate payments," commented that:

> In this connection it is to be noted that the program drafted by Giant was explicit in its insistence that it was not intended to supplant or be fitted into any of the promotional programs then maintained by Giant's suppliers. In other words, Giant's program was designed to exist independently of and/or coextensively with any of its suppliers' regularly available cooperative advertising programs. 307 F.2d at 187.

That principle is applicable here. The "special" payments respondents received from Philip Morris were in addition to those they had received in the past, and continued to receive, under that supplier's "regular" promotional program.[86] And the payments they received from the other four suppliers (i.e., those who participated in the "coupon book" promotions), including both the promotional payments and the outright price concessions, were granted to them under an agreement containing the following provision:

Offer Must Be Exclusive at Fred Meyer During the 4 Week Period.[87]

[fol. 120] Thus, each supplier who participated in respondents' "coupon book" promotion agreed with respondents that it would not, during that particular four-week period of time, "participate" in a similar program sponsored by any other buyer. Therefore, if any participating supplier had a promotional program already in operation, respondents' coupon book plan would necessarily be something "in addition to" the existing plan. By the very terms of their contracts with their suppliers, respondents precluded any possibility that they could be "fitted into" the promotional plans they were then making available to their other customers. The conclusion is inescapable that these respondents not only "knew" their suppliers were violating Section 2(d) of the amended Clayton Act when they granted these payments, but affirmatively *required* them to do so.

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[86] See note 29, supra, and accompanying text.

[87] CX 7. See also CX 21.

Respondents argue, of course, that the participating suppliers *could* have (1) offered their other buyers some other promotional program during those particular four-week periods of time, or (2) offered those buyers this very same "coupon book" promotion during some other period of time, i.e., during one of the other eleven months in the year. Accordingly, respondents contend that they had no reason to suspect that the participating suppliers had not make the promotional payments in question available to their other buyers on proportionally equal terms.

We cannot agree. It is our view of the law that neither of these suggested courses of action could have brought the participating suppliers into compliance with Section 2(d). That provision requires not only that competing purchasers be offered an opportunity to receive proper- [fol. 121] tionally equal payment for performing the same services, but that they must be offered that opportunity at the same time.

In regard to the first argument, it is true of course that a seller may have a promotional "plan" with several alternative features, only one of which may be suitable for, or usable by, a particular customer. State Wholesale Grocers v. The Great Atlantic & Pacific Tea Co., 258 F. 2d 831 (7th Cir. 1958); Lever Brothers Co., 50 F.T.C. 494, 503 (1953). However, such a seller may not take it upon himself to decide which of the several features of his promotional plan is to be offered to a particular customer; that choice is to be made by the customer himself, after the seller has presented him with the terms of all of the "available" alternatives. Chestnut Farms Chevy Chase Dairy, 53 F.T.C. 1050, 1059-1060 (1957); Liggett & Myers Tobacco Co., Inc., 56 F.T.C. 221, 249 (1959); Exquisite Form Brassiere, Inc., Dkt. 6966, opinion of the Commission October 31, 1960, remanded on other grounds, Exquisite Form Brassiere, Inc. v. Federal Trade Commission, 301 F. 2d 499 (D.C. Cir. 1961), cert. denied, 369 U.S. 888 (1962). As we said in the latter case, "the customer and not the seller should decide what is or is not usable or suitable for him and should have the opportunity to select that feature of a plan which suits him best." Opinion of the Commission, p. 3.

Respondents contend for a construction that would permit a seller with a promotional plan having, say, ten different features, to select Feature 1 for Buyer A, feature 2 for Buyer B, and so on, concealing from each the nature [fol. 122] of the activity for which the others were being paid. The test of proportionality, in such a situation, would be wholly quantitative. So long as a buyer who purchased $100 worth of goods from a seller was given a promotional allowance that was no less than one tenth as much as that given to a buyer who bought $1,000 worth of goods, the statute would be satisfied, regardless of what restrictions the seller might place on the respective buyer's use of the money.

This ignores, of course, the qualitative factor. Suppose, for example, it is established that a particular product can be promoted twice as effectively through one medium as another, e.g., $1 spent on *newspaper* advertising will produce twice as much in additional sales as $1 spent in *radio* advertising of the product in question. Could it then be said that a seller was distributing his money among his competing buyers on "proportionally equal terms" if he proportioned the money itself fairly but contracted with Buyer A to let him spend his share on the superior medium (newspaper) while insisting that Buyer B spend his on the inferior medium (radio)? We think not. Although they received the same number of dollars (or proportionally the same) one would still be getting an advantage over the other. The seller must not give the dollar and then dilute its value by forbidding the recipient to use it in a manner that is permitted to a competing buyer. Here, therefore, the suppliers in question would not have been in compliance with Section 2(d) if they had given to respondents' competitors a sum of money proportionally equal to that received by respondents, *but conditioned it upon a promise by those other buyers that* [fol. 123] *they would not use the money in sponsoring a "coupon book" promotion.*

We think the soundness of this is illustrated by the facts in this very case. In the literature used by respondents to induce their suppliers to participate in the coupon book promotions they characterize the plan as

"unlike any other advertising medium"; as "a unique and effective medium"; and as a method that assures the supplier of "mass distribution of your product at the lowest possible cost." They state further: "The customer buys the book for 10¢—Eagerly reads the coupons, tears them out and brings them to Fred Meyer Stores for redemption." In addition, respondents refer to "the natural impulse to buy that goes with coupons." [88] Thus the very essence of respondents' pitch to the suppliers whom they solicit is that the coupon book is an advertising medium that, dollar-for-dollar, is superior in pulling power to all other media. By their own admission, therefore, a competing buyer given the same amount of promotional money, if prohibited by the seller from using it to sponsor a "coupon book" promotion, would be unable to get the same results from its use.

The same principle applies to the time factor. It is true, as argued by respondents, that their "exclusive" option on the coupon book plan extends for only a one-month period out of each year, leaving the participating suppliers free to offer respondents' competitors the very same program during any of the remaining eleven months. But we must assume that respondents have not acted arbi- [fol. 124] trarily or capriciously in selecting, for the past 25 years or more, a four-week period that begins in September and ends in October. The inference is plain that respondents themselves regard this as the most propitious season of the year for staging this particular type of promotion. Accordingly, we must conclude that a competitor, even if permitted to use the coupon book program in, say, July, would not get the same results per dollar of expenditure that respondents get in September and October. Again, there can be quantitative similarity, but vast differences of a qualitative character.

We think this conclusion is compelled by the reasoning of the court in Atlanta Trading Corp. v. Federal Trade Commission, 258 F. 2d 365 (2d Cir. 1958). There a supplier had granted, in the month of July, a $500 promotional allowance as consideration for the promotion of its

[88] CX 6.

product during the buyer's Fourth of July promotional event. It was some six months later—in December—before the supplier sold that product to a competitor of the favored buyer. The court held that the seller, when it made the December sale, owned no duty under Section 2 (d) to offer the allowance it had extended to the July customer, i.e., that a seller, merely because he has once made a sale accompanied by a promotional allowance, is not forever bound to keep that offer open. "The purpose of Section 2(d) is to give *equal opportunities* to *competing* merchants . . . Certainly by December 1954 Atlanta could market pork shoulder picnics free from any restraint placed upon it by the July 1954 promotional allowance." 258 F. 2d at 372 (emphasis added).

[fol. 125] Respondents' theory boils down to this: A promotional allowance given exclusively to them for a one-month period in September-October, no matter now successfully they use it to ravage the business of their competitors, does not violate Section 2(d) if, at some later period of time (e.g., the following month). those allowances are taken from respondents and given to the injured competitors. The rationale of respondents' theory, apparently, is that whatever gains they might make during the period of their advantage will be offset when they subsequently become the anvil and their competitors take up the hammer. We cannot accept any such "turnabout" construction of the statute. Its very purpose, as noted by the court in the Atlanta case, supra, is to give "equal opportunities" to those who compete. We think that when one buyer starts a supplier-financed promotional campaign, competing buyers should not have to suffer through the period of that buyer's dominance and rely upon the hope of getting revenge in later months; instead, they should be given the same concessions, on proportionally equal terms, so that they can defend themselves *then*. It is our conclusion, therefore, that the "exclusivity" feature in respondents' coupon book contracts compelled the participating suppliers to violate Section 2(d). Accordingly, respondents necessarily "knew" of that illegality and thus knowingly induced these allowances in violation of Section 5 of the Federal Trade Commission Act.

It follows from the foregoing that there is no merit in respondents' complaint that the examiner wrongfully limited the inquiry to the periods of time in which re-
[fol. 126] spondents received the payments found unlawful herein. In this connection, it should be noted that the examiner did not, as charged by respondents, confine "the evidence" to those specific periods of time.[89] He merely held that counsel supporting the complaint was within his rights in limiting his own case to those periods of time and that respondents, in cross-examining Commission witnesses, could not go beyond the scope of the direct examination.[90] They were quite free, however, to bring in, in the presentation of their own case, all the evidence they pleased as to concessions received by those non-favored buyers during other periods of time. Interestingly enough, respondents' own case consisted of two witnesses, one of whom, as Sale Director of a Portland newspaper, testified in substance that there was a lot of promotional activity going on in the City of Portland. Respondents' only other witness, their own Director of Marketing, corroborated the newspaperman's testimony as to the vigor of Portland advertising; denied that he had any knowledge "as to what prices or what discounts were allowed" by the suppliers in question to their other customers;[91] insisted that he had never been told by those suppliers that the
[fol. 127] concessions granted to respondents were illegal;[92] and pointed out that "coupon book" promotions have been used by others, i.e., by drug stores in various cities, including one in Portland.[93] (In the latter connections, it should be noted that respondents have no "inventor's rights" to the coupon book promotional plan.

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[89] E.g., respondents' brief, p. 10.

[90] "Now, your defense is not that the discount was given at the same time, but maybe a month or so later, a similar discount to equalize was given. Now, that, I think, is a matter of defense. It's not a case that he [counsel supporting the complaint] has to prove in the first instance." Tr. 163.

[91] Tr. 887.

[92] Tr. 890.

[93] See RX 10-13.

They did not originate it. Their Chairman of the Board testified that it was adopted back in the 1930's "because it was operated by other operators around the United States." [94]

The meaninglessness of the negative fact that respondents' suppliers failed to protest the illegality of these promotional allowances and price concessions is illustrated by the Idaho Canning incident discussed above. Having capitulated to respondents' demand for $2,935.41 ($350 to pay for a "page" in their coupon book, and the remaining $2,585.41 as a rebate or retroactive price concession of 33⅓%) after several months of vigorous resistance, it can be reasonably inferred that a further protest based on the non-availability of such concessions to Idaho's other customers would have been equally futile. After all, the very fact of that resistance should have informed respondents that they were demanding something that supplier did not ordinarily give. Being among Idaho's larger customers, respondents could hardly have supposed that this relatively weak supplier ($1 million in annual sales as compared to respondents' $40 million), in protesting their [fol. 128] demands, was perversely and unjustly trying to withhold from them a promotional allowance it had already accorded to their smaller competitors, or attempting to charge them a price that was 33⅓% higher than the price it was charging those smaller customers.

Turning to the matter of affirmative defenses, respondents have made no attempt to prove that either the price concessions or the promotional allowances were the result of their suppliers' efforts to "meet competition" under Section 2(b). Nor do they raise that issue on this appeal. But they make a broad challenge to the sufficiency of the proof on the question of "knowledge," and there exists some doubt as to whether or not the absence of "equally low" competitive offers is a necessary part of the affirmative case of counsel supporting the complaint. We do not think that it is. Under the "balance of convenience" rule announced in Automatic Canteen Co. v. Federal Trade Commission, supra, 346 U. S. 61 (1953), a buyer charged with a violation of Section 2(f) must be exonerated unless

[94] Tr. 494.

it is affirmatively shown that he had no reason to believe his supplier could not cost justify the concession in question. But the Court did not say that the Commission had this burden on the issue of "meeting competition." Indeed, the Court expressly recognized that, whereas the Commission's investigative powers give it readier access to the seller-records essential to a cost study than a receiving buyer could or should have, a different rule might be appropriate if the issue was "meeting competition" instead of cost justification. Automatic Canteen Co. v. Federal Trade Commission, supra, 346 U. S. at 79, note 23. [fol. 129] If a discriminating seller gives a lower price or a more favorable promotional allowance to a particular buyer in response to a similar offer to that buyer from other sellers, the buyer himself, from the nature of the case, would be expected to know more about it than the discriminating seller. After all, a buyer who receives a discriminatory concession should know what offers it has itself received from other sellers. In the instant case, for example, respondents doubtless know whether or not other sellers of peaches offered them an equally attractive promotional allowance or a 33⅓% reduction in price prior to Tri-Valley's concessions. If so, we think it is their burden to come forward with such evidence. Counsel supporting the complaint would be wandering far afield if he undertook to call to the stand all known packers of peaches in order to ask them whether or not they had offered to sell to respondents at the same low price, or to accord them the same promotional allowances, as those received by respondents from Tri-Valley. But even if it should be supposed that the affirmative case must include proof of respondents' "knowledge" that their suppliers were not granting these concessions as a good faith effort to "meet competition," we think that burden has also been met. These respondents, as noted above, are close students indeed of seller-prices and allowances. They wanted, and satisfied themselves that they had gotten, the "best" deals available. We think it a fair inference that these were not only the best deals being offered by those particular suppliers, but they were also better than those being offered by any other suppliers.

[fol. 130] We also think these respondents had "knowledge" of the fact that the discriminatory prices they induced could not be exonerated under the "changing conditions" proviso of Section 2(a). They have not raised that issue here, but, for the reasons discussed above in connection with the "meeting competition" defense, we think it appropriate to note that the "coupon book" discriminations involved herein have been induced and received in September and October of every year for at least the past 25 years. It seems most unlikely that 72 suppliers selling products ranging from deodorants to bottled beverages could all simultaneously experience "changing conditions affecting the market for or the marketability of the goods concerned." The instant record, in showing the year-after-year nature of these inducements, and the broad spectrum of the products involved, is more than adequate to satisfy any requirement on this point.

There is, however, one affirmative defense that respondents do assert in regard to the Section 2(f) charge. They contend that, because they buy in very large quantities, they had no reason to believe that their suppliers could not "cost justify" these concessions under Section 2(a), and that, therefore, they cannot be held to have "knowingly" induced them in violation of Section 2(f). Automatic Canteen Co. v. Federal Trade Commission, supra, 346 U.S. 61 (1953). It is true, of course, that respondents would be exonerated if these concessions were *in fact* cost justified, *or*, if respondents had no reason to *believe* they were not cost justified. As to the first, that is, the *fact* of cost justification, it should be noted that [fol. 131] this is a one-way street. A valid cost study showing that the concessions were *cost* justified would defeat complaint counsel's case, but the converse is not true: such a study, if it showed that the concessions *were* not cost justified, would not prove that respondents "knew" that fact. Accordingly the Supreme Court's Automatic Canteen opinion did not say that actual cost determinations were necessary in every Section 2(f) case.[95]

[95] "Proof of cost justification being what it is, too often no one can ascertain whether a price is cost-justified." 346 U.S. at 79.

Here, therefore, neither complaint counsel nor respondents introduced evidence on that issue. Instead, the evidence was devoted to the precise question of whether or not respondents had "reason to believe" the concessions they induced could not be cost justified, i.e., respondents' "state of mind."

None of the suppliers in question grant quantity discounts. All buyers, regardless of the quantity in which they purchase from the four sellers in question, pay the same invoice price (except for the concessions found unlawful here). For example, it is said that Cannon Mills' one-price policy is common knowledge throughout the country. Therefore, respondents pay, during eleven months out of the year, the same price that every other [fol. 132] buyer pays.[96] And after the one-month period of the coupon book promotion ends, they go back to paying that higher price. Since respondents are unable to get any price concessions from these suppliers during eleven months out of each year, we think it a fair inference that respondents' purchasing in larger quantities than their competitors, to the extent that they do so, does not give rise to any measurable cost savings for those sellers. If such cost savings existed, why are respondents unable to induce their suppliers to pass them on to them during eleven months of each year? Surely it is not because respondents are too weak in buying power to persuade these suppliers to grant them something that can be justified. As noted, respondents are twice as large, as measured in sales volume, as Tri-Valley Packing and many times larger than Idaho Canning. (Respondents sold more than $40 million in 1957, as compared with $22 million for Tri-Valley, and slightly over $1 million for Idaho Canning.)

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[96] Respondents' memorandum of their coupon book "agreements" with participating suppliers contains an entry entitled "Regular Cost" and another entitled "Coupon Cost." Thus CX 114, the memorandum of agreement with Cannon Mills for the latter's participation in the 1956 coupon book promotion shows the "regular" price as $1.65 per doz., and the "coupon" price as $155 per doz. Other buyers paid the $1.65 "regular" price during the period of respondents' promotion, and respondents themselves went back to paying that price at the end of the one-month promotion period.

It is true, of course, that respondents' annual coupon book promotions have the effect of increasing their volume of sales (and hence their volume of purchases) during those one-month periods, as compared with other one-month periods during the year. But we think this is without significance for two reasons: first, the fact that respondents get no concessions from these suppliers for buying in vastly larger quantities than some of their com- [fol. 133] petitors during eleven months of the year strongly suggests, as noted, that quantity buying, regardless of the size of the orders, is wholly incapable of producing any significant savings for those sellers; and, second, it would seem somewhat anomalous and unfair to suggest that a favored buyer who receives a drastic price reduction (e.g., the 33⅓% involved herein), and uses it to increase his sales volume, can then claim this increased volume of purchase as "justification" for the initial price reduction. If these non-favored buyers had received a 33⅓% price cut, they, too, would have doubtless increased the volume of their sales and, in turn, of their purchases from the suppliers.

On the first point, the evidence fully supports the inference that volume purchasing results in no savings to these suppliers. Respondents' own officials testified that every feature of their purchasing from the suppliers in question remained precisely the same during the various one-month periods of the coupon book promotions as during the remaining eleven months of the year (methods and terms of shipment remained the same, purchasing through the broker continued, and so forth). Illustrative of this testimony is the following:

> "Q. Did you do anything in the 1957 coupon book promotion that might result in a cost savings to Idaho Canning?
> "A. No." [97]
>
> . . .
>
> "Q. Now, who pays the freight?
> "A. Fred Meyer, Incorporated, pays the freight.
> [fol. 134] "Q. Is that freight in addition to the cost of the item?

[97] Tr. 98.

"A. Well, it's over and above the cost of the merchandise as billed to us by Cannon Mills, yes.

"Q. Now, is that freight in addition to the item as billed to you, no matter what quantity?

"A. To the best of my knowledge, it always has been.

. . .

"Q. Well, did you do anything to change your shipping transactions, anything that would save them freight?

. . .

"The Witness: We pay the freight. We can't save Cannon Mills anything." [98]

Respondents elicited from one of the suppliers, on cross-examination, testimony to the effect that savings were realized on the *labeling* of canned corn in the quantities purchased by respondents, as compared with the smaller quantities purchased by a smaller purchaser, Wadhams & Company.[99] That same witness testified, however, that another non-favored customer, Hudson House, was "pretty much on a par with Fred Meyer. They're kind of an equal sort of a customer in a way volume-wise, not all of the same grade or the amounts. . . . I would think that Fred Meyer used a greater amount of fancy." [100] In any event, however, we think [fol. 135] it unreasonable to suppose that the mere labeling of canned goods could account for one third of the price charged for both the can and the goods themselves. And we think it even more improbable that, if labeling for small purchasers cost that much extra, the supplier would continue doing business during eleven months out of the year on a one-price basis, charging the same to all customers both large and small.

The Automatic Canteen case, supra, suggested a number of ways in which the Commission might attempt to show "knowledge" on the part of inducing buyers, but it

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[98] Tr. 336-337.

[99] Tr. 544-547.

[100] Tr. 534.

did not say that those were the only routes to that end. Indeed, the Court left us free to base such a finding on other proofs, requiring only that we "explain why other proof may be sufficient to justify shifting the burden of introducing evidence that the buyer is or is not an unsuspecting recipient of prohibited discriminations." 346 U.S. at 81. We have no doubt that a buyer who gets a 33⅓% price concession during only one month out of each year, paying the same price as his competitors during the other eleven months, has every reason to believe that there is not the remotest possibility of "cost justification" for that temporary concession. Respondents have offered no explanation whatsoever as to why, if such a price discount could be cost justified for four weeks in the Fall of each year, it could not be similarly cost justified at other times. In the absence of such an explanation, we think the inference is inescapable that respondents "knew" there could be no such cost justification. Accordingly, we see no necessity for a prolonged inquiry [fol. 136] as to whether or not respondents' volume of purchases (vis-a-vis those of the non-favored buyers named by the examiner) did in fact effect cost savings.

V.

Respondents complain also about the scope of the cease-and-desist order issued by the examiner. They contend that it (1) goes beyond the actual practices found to have been unlawful; (2) embraces all of the products sold by respondents, rather than just those involved in the violations found by the examiner; (3) is couched in the terms of the various statutory provisions involved, without "defining" those terms and the acts respondents are prohibited from committing; and (4) erroneously runs not only against the corporate respondent, but against the two individual respondents as well.

The latter argument ignores the fact that, as stated by counsel supporting the complaint, the corporate respondent is nothing but the "alter ego" of those two individual respondents. They and their immediate families own virtually all of its voting common stock (i.e., it is a "family" corporation). This fact alone is sufficient

basis for subjecting them to the order. Otherwise, it could easily be circumvented. As the Supreme Court said in Federal Trade Commission v. Standard Education Society, 302 U. S. 112 (1937):

> The record in this case discloses closely held corporations owned, dominated and managed by these three individual respondents. In this management these three respondents acted with practically the same freedom as though no corporation had existed. So [fol. 137] far as corporate action was concerned, these three were the actors. Under the circumstances of this proceeding, the Commission was justified in reaching the conclusion that it was necessary to include respondents Stanford, Ward and Greener in each part of its order if it was to be fully effective in preventing the unfair competitive practices which the Commission had found to exist. The court below was in error in excluding these respondents from the operation of the Commission's order. At 120.

Here, in addition to controlling the voting stock of the corporation, these two individual respondents clearly knew about, and authorized, the practices found unlawful. Respondent Chiles testified that, in regard to the advertising activities of the company, "we set the policies and review the practices." [101] This witness stated that the duties of the other individual respondent, Fred G. Meyer, Chairman of the Board, was to "give general direction to the firm. . . ." [102] When called as a witness by counsel supporting the complaint, Meyer stated that he had been in the industry 50 years; that he had been President until four or five years ago; that his "duties are vague"; that he has "no specific duties"; that he now has nothing to do with advertising or sale policies (he was active in them until about ten years ago); that he doesn't know how many buyers the company has; that he doesn't know whether suppliers give the company free goods; that he [fol. 138] didn't know his company staged a "Thrift

[101] Tr. 7.

[102] Tr. 11.

Days" promotion in 1958; that he had "no idea" as to size of the company's annual advertising bill; that he had started the coupon book promotion "because it was operated by other operators around the United States"; that he doesn't know how a particular coupon book promotion is to be judged a success or a failure; that he doesn't know whether or not the coupon book promotion had any effect on his business in 1956; that he doesn't know whether or not the volume of the company's business increased from 1956 to 1957; and that he doesn't know whether or not the grocery business is "keenly competitive."

Ignorance, whether real or professed, is insufficient basis for dismissing a complaint as to a respondent who certainly should have known of the existence of the illegal practices. We see no reason to believe that these two respondents, with their admitted responsibility for running the company, would have permitted this annual promotional event to continue unabated for 25 years unless they had personally approved it. This is not a question of something that could have been concealed by subordinates; if "a majority of Portland's 120,000 families" were apprised of the details of these programs,[103] we think it is fair inference that the Chairman of the Board also knew about them. High corporate officials who pass upon and approve illegal practices are no less liable than the subordinates who actually do the work. Since these two men are the ones with the actual power to see that [fol. 139] our order is obeyed, we think they should be given every incentive to exercise it.

In regard to the product coverage of the order, respondents have offered no persuasive reason as to why only those products involved in the specific violations of law cited by the examiner should be included. It is well settled that a violation involving even a single product is sufficient basis for an order covering all of the offender's products. See, e.g., Niresk Industries, Inc. v. Federal Trade Commission, 278 F.2d 337, 343 (7th Cir. 1960), cert. denied, 364 U. S. 883. Further the violations of these respondents involved vastly more products than the

[103] CX 19.

five that happened to have been involved in the transactions specifically found unlawful by the examiner. The latter were merely illustrative of the practices condemned. Thus, respondents' coupon book promotion involved no less than 72 products each year, and the same suppliers do not invariably participate year after year. In soliciting supplier participation, respondents do not confine themselves to particular products or even to particular classes of products. Thus, any one of the many thousands of products sold in their stores could be featured in respondents' coupon book if respondents themselves decided its appeal was wide enough to warrant such promotion. There being nothing in the nature of the practices involved to suggest that other products could not be used therein, the public interest requires that the order reach all products handled by respondents.

Nor is there any merit in respondents' contention that the examiner's order is defective for following the language of the statutes involved, with no attempt to "de- [fol. 140] fine" those statutory terms. The various words and phrases used in the order (e.g., "like grade and quality," "available," etc.) are words of art in the law whose meanings are to be found in the many volumes of decisions of this Commission and of the courts. In order to define them, we would have to make the order a veritable restatement of the law of price discrimination. Nothing of the sort is necessary. If these respondents are honestly resolved to obey the law, they will have no difficuty in understanding what is prohibited by this order. Should they need assistance, our Compliance Division, in the course of its duty to see that respondents file a satisfactory report as to the steps they have taken to comply with the order, will point out any shortcomings in their plan for compliance.

In certain minor respects the order does go beyond the scope of the practices found unlawful. Thus, subsection (a) of the first paragraph prohibits respondents from knowingly inducing a discriminatory price where "the seller is competing with any other seller for respondents' business." This is a primary line prohibition, whereas the only probability of injury found in the instant case is of the secondary and tertiary varieties, i.e., between the

favored buyer and its competitors, and between the favored buyer and customers of the non-favored buyers. Also, the second paragraph of the order prohibits the "inducing, receiving *or* contracting for the receipt" of unlawful promotional allowances, whereas in Giant Foods, Inc. v. Federal Trade Commission, 307 F. 2d 184 (D.C. Cir. 1962); Grand Union Co. v. Federal Trade Commission, 300 F. 2d 92 (2d Cir. 1962); and American News [fol. 141] Co. v. Federal Trade Commission, 300 F. 2d 104 (2d Cir. 1962), it was held that such orders under Section 5 should be limited to "inducing *and* receiving" such allowances. The order will be modified in these particulars.

In addition, however, we believe that the order should be broadened in one respect. The second paragraph prohibits the knowing inducement of unlawful promotional allowances only where those allowances are not made available to all other customers "competing with the respective respondents in the distribution of such products." While we believe a proper interpretation of this language would include the situation where "a manufacturer gives a retailer an allowance not given to a wholesaler whose customers compete with such retailer," Krug v. International Telephone & Telegraph Corp., 142 F. Supp. 230, 236 (D.N.J. 1956), the order will be amended to spell this out clearly. Here two of the non-favored buyers were primarily wholesalers whose retailer-customers competed with respondents in the ultimate resale of the goods to the consumer. To fail to prohibit respondents from continuing their inducement of promotional allowances they know or should know are not being made available to those two wholesalers on proportionally equal terms would permit one of the very things found unlawful herein.

Respondents' exceptions are denied. The initial decision and order as supplemented and modified to conform to the views expressed in this opinion will be adopted as the decision of the Commission.

[fol. 142] Commissioner Anderson is in agreement with those portions of the opinion and order dealing with inducing price discrimination, but concurs in the result only on the question of inducing 2(d) violations.

Commissioner Elman concurred in part and dissented in part for the reasons set out in his opinion.

Commissioner Higginbotham did not participate by reason of the fact that this matter was argued before the Commission prior to the time he was sworn into office.

March 29, 1963

[fol. 143]

BEFORE FEDERAL TRADE COMMISSION

Docket No. 7492

COMMISSIONERS:

Paul Rand Dixon, Chairman
Sigurd Anderson
Philip Elman
Everette MacIntyre
A. Leon Higginbotham, Jr.

In the Matter of FRED MEYER, INC., a corporation, and FRED G. MEYER and EARLE A. CHILES, individually and as officers of said corporation.

COMMISSIONER ELMAN, CONCURRING IN PART AND DISSENTING IN PART:

In respect of the charge that respondents induced illegal price discriminations, I concur in the order. The opinion, however, paints with a needlessly broad brush and contains much with which I do not agree.

In respect of the charge that respondents induced illegal promotional allowances, I concur in the conclusion of violation. The order, however, seems to me inadequate and not designed to give much help to those most directly injured by Meyer's unlawful conduct, namely, its retail competitors. The reason why the order is so inadequate is that it is based upon an unduly literal and restrictive interpretation of the Robinson-Patman Act.

Because of its large volume of business, Meyer—a retail grocery chain—buys directly from producers many products which its smaller competitors must buy through [fol. 144] wholesalers. Meyers induced certain of these producers to give it substantial advertising and promotional allowances. What made this practice illegal, as I see it, is that the allowances were not also made available on proportionally equal terms to Meyer's retail competitors. But that is not the Commission's view of the law. The Commission holds that the allowances to Meyer were unlawful because of the producers' failure to give them to the *wholesalers* from whom Meyer's retail competitors bought. Reflecting this interpretation of the statute, the order requires, in effect, only that promotional allowances to Meyer also be made available to such wholesalers. Nothing in the order would require the wholesalers to pass these allowances on, directly or indirectly, to the retailers who compete with Meyer and who are the victims of the discriminations.

Suppose a producer, from whom Meyer buys directly, furnished it with large display material and "demonstrators" who hand out free samples. Under Section 2 (e) the Commission would enter an order designed to assure that similar services would be afforded Meyer's retail competitors. The order would require the producer to make these services available "to competing retailers on proportionally equal terms." These were the express terms of the Commission's order in the well-known Elizabeth Arden case. 39 F.T.C. 288, 305; 156 F. 2d 132 (2d Cir. 1946), cert. denied 331 U. S. 806 (1947). I think an order in similar terms should be entered here.

The reason why the Commission refuses to do so is that the instant case involves promotional allowances, not services or facilities, and therefore the violation is of [fol. 145] Section 2(d) rather than 2(e). But, as has frequently been observed, Sections 2(d) and (e) are in pari materia, both being directed at essentially the same kind of discrimination. Exquisite Form Brassiere, Inc. v. FTC, 301 F. 2d 499, 502 (D.C. Cir. 1961); Elizabeth Arden Sales Corporation v. Gus Blass Co., 150 F. 2d 988 (8th Cir. 1945), cert. denied 326 U. S. 773 (1945). In

the Exquisite Form case, the Court of Appeals emphasized the substantial identity and inter-relationship of Sections 2(d) and (e) of the Act (p. 502):

> "The economic evil sought to be outlawed by it is the same whether the services and facilities are furnished to the customer or by the customer with reimbursement, so long as discrimination is practiced. Congress was here dealing with a fundamental economic concept; it was not shadowboxing or indulging in fine semantic shadings. It is impossible to believe it meant to treat one process of discrimination one way and to treat in another way another process equally effective as discrimination."

The Commission, while doubtless aware of the inadequacy of its 2(d) order here as compared with the type of 2(e) order entered in Elizabeth Arden, apparently considers itself precluded by a difference in language between Sections 2(d) and (e). Both sections make it unlawful for a supplier to grant promotional allowances or services on discriminatory terms. Section 2(d), dealing with allowances, requires that they be "available on pro- [fol. 146] portionally equal terms to all other customers competing in the distribution of such products or commodities." Section 2(e), dealing with services, requires that they be furnished "to all purchasers on proportionally equal terms." If a retailer who buys through a wholesaler is a "purchaser", and therefore protected by Section 2(e) against discriminatory services furnished his competitors by a producer, why is he not also a "customer" of the producer and therefore protected by Section 2(d) against discriminatory allowances?

The difference in language between Sections 2(d) and (e) seems to me without significance here. Nothing in the nature and purpose of the provisions or the legislative history justifies a difference in their practical application. Non-favored retailers are hurt just as much, and in the same way, by discriminatory allowances granted their competitors in violation of Section 2(d) as discriminatory services furnished in violation of 2(e). I find no evidence that Congress considered that its use of the word "customers", rather than "purchasers", in Section 2(d)

would deprive them of the benefit of that provision. As the Second Circuit held in American News Co. v. FTC, 300 F. 2d 104, 109 (1962), "The term 'customer' in § 2(d) should be given the same meaning as 'purchaser' in § 2(a) and (e) in order to harmonize parallel sections of a statute aimed at a common purpose." To quote again from Judge Prettyman's opinion in the Exquisite Form case (p. 505):

> "Misfits in words or phrases are not infrequently encountered when bills have been amended in the midst of debate on the floor of one or the other of [fol. 147] the Houses of Congress. This statute was amended on the floors of both Houses. It is not surprising that the final product is not perfectly meshed, as it might have been had it come undisturbed from the drafting board of a skilled draftsman."

Like Section 2(e), "The purpose of Section 2(d) is to give equal opportunities to competing mechants, who acquire products for re-sale", Atlanta Trading Corporation v. FTC, 258 F. 2d 365, 372 (2d Cir. 1958); the "fundamental aim" of the one section, like the other, is "to protect buyers' competitors from the evil effects of direct or indirect price discrimination", American News Co. v. FTC, 300 F. 2d 104, 109 (2d Cir. 1962).

The Commission's order here reflects the kind of rigid literalism in statutory interpretation from which the courts of this country long ago liberated themselves. An administrative agency, whose primary function is to effectuate basic legislative policy in the context of the economic realities in which it presumably has expertise, should not feel bound by "fine semantic shadings" of no real significance, when the courts, as the Exquisite Form case illustrates, feel free to effectuate the "fundamental economic concept" and "basic purposes" of the law.

March 29, 1963

[fol. 148]

BEFORE FEDERAL TRADE COMMISSION

* * * *

OPINION ON RESPONDENTS' EXCEPTIONS TO THE PROPOSED ORDER

By Dixon, Commissioner:

On March 29, 1963, the Commission issued its opinion in this matter and a proposed order that would prohibit respondents from knowingly inducing their suppliers to grant them unlawful price concessions and unlawful promotional allowances. Pursuant to Rule 4.22(c) of the Commission's Rules of Practice, respondents have filed their exceptions to that proposed order, and counsel supporting the complaint has filed his reply thereto.

Respondents' principal contention, and the only one that presents a question not disposed of in our prior opinion, is the argument that respondents were "surprised" by our conclusion that *wholesalers*, in their competition with direct-buying retailers, are entitled to a proportionally equal share of the promotional allowances induced and received by such retailers, and that our injection of this "novel" interpretation of the law into the case at this late date deprived respondents of an opportunity to present factual evidence on the point.

This argument confuses questions of fact with issues of law. Each and everyone of the *facts* on which we based the conclusion in question was put in issue by the pleadings, thoroughly and vigorously litigated at the hearings, and presented to the Commission in the briefs and oral argument.

Thus, Count I of the complaint charged respondents with knowingly inducing, in violation of Section 2(f) of [fol. 149] the Clayton Act, as amended by the Robinson-Patman Act, *price* concessions not accorded to respondents' competitors. Count II of the complaint charged respondents with knowingly inducing, in violation of Section 5 of the Federal Trade Commission Act, *promotional allowances* not offered or made available by the discriminating suppliers "to all other customers of such suppliers competing with respondents in the sale and distribution

of such products," that is, with inducing allowances those *suppliers* were prohibited by Section 2(d) of the amended Clayton Act from giving.[1]

At the hearings, counsel supporting the complaint fully established that respondents, under what they called their "coupon book" program, had each year, for a period of about 25 years, knowingly induced some 72 of their suppliers[2] to give them sums of money that were in part discriminatory *price* concessions (Count I of the complaint) and in part promotional allowances (Count II of the complaint). It was also established that respondents had knowingly induced certain other payments ("special" payments that were unrelated to the "coupon book" program) that also fell within the ambit of Count II. [fol. 150] In establishing that these price concessions and promotional allowances had not been received by respondents' Portland competitors, complaint counsel introduced detailed evidence concerning sales by five (5) of respondents' suppliers to six (6) of those suppliers' other Portland customers.[3]

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[1] As the court noted in Giant Food, Inc. v. Federal Trade Commission, 307 F.2d 184, 186 (D.C. Cir. 1962), cert. denied, February 18, 1963, this language in the complaint has been properly "borrowed" from Section 2(d).

[2] While some suppliers have participated in more than one of the yearly "coupon books," the 72 participating in any given year are not necessarily the same as those that participated the year before.

[3] Those five suppliers, and the six non-favored customers, are as follows:

Supplier	Product Sold	Non-Favored Customer(s)
Tri-Valley Packing	Canned Peaches	Hudson House [grocery wholesaler and retailer]
Idaho Canning	Canned Corn	Hudson House Wadhams & Co. [grocery wholesaler]
Burlington Industries	Nylon Hose	Roberts Bros. [retail department store]
Cannon Mills	Towels	Lipman, Wolfe & Co. [retail department store]

[Footnote continued on page 109]

[fol. 151] Two of these non-favored customers—Hudson House and Wadhams & Company—were Portland *wholesalers.*[4] And both of these wholesalers were denied not only the promotional allowances their suppliers had given to respondents, but the price concessions as well. Hence, their status as "competitors" of respondents, even if not recognized by respondents as an issue under the Count II charge of the complaint (promotional allowance), was certainly a major question of fact under the Count I charge (price concessions). Respondents surely had no doubt that it is a "discrimination" in *price* for a supplier to charge its retailer-customers a lower *price* than it charges "wholesalers *whose customers* compete with such retailers." Federal Trade Commission v. Morton Salt Co., 334 U. S. 37, 55 (1949) (emphasis added).

Therefore, when complaint counsel began putting in evidence that those two wholesalers had been denied the price concessions and promotional allowances in question, respondents were forcefully put on notice that these were two of the "competitors" referred to in the complaint. Respondents also knew that, under Morton Salt, supra, a wholesaler is entitled to equal price treatment, vis-a-vis direct-buying retailers such as respondents, only if he, the wholesaler, resells the goods in question to retailers who, in turn, resell in direct competition with the favored re-

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[3][Continued]

Supplier	Product Sold	Non-Favored Customer(s)
Phillip Morris	Tobacco Products	Oregon Piggly Wiggly [retail grocer] United Grocers [retail grocer]

The first four of these non-favored customers, Hudson House and Wadhams (the two wholesalers) and Roberts Bros. and Lipman, Wolfe & Co. (the two retail department stores), were denied *both* the promotion allowances *and* the price concessions that had been given to respondents under their "coupon book" program.

Philip Morris' sales to the two named retail grocers (Oregon Piggly Wiggly and United Grocers) were involved in the promotional allowance charge *only*. (Its payments to respondents were for such "special" services as favored shelf space, etc. See Opinion, pp. 13, 14-19.)

[4] One of them, Hudson House, engages in some retailing (Opinion, p. 21, n. 34), but is primarily a wholesaler.

tailers. The crucial question of *fact*, therefore, was this: [fol. 152] did those two wholesalers sell the merchandise to Portland retailers who, in reselling it, had to compete with respondents? Under the view we take of the law, this is also the crucial question of *fact* in determining whether those wholesalers were entitled to share the promotional allowances in question. As the court said in Krug v. International Telephone & Telegraph Corp., 142 F. Supp. 230, 236 (D.N.J. 1956), a "violation of Section 2(d) may occur when a manufacturer gives a retailer an allowance not given to a wholesaler *whose customers compete with such retailer.*" (Emphasis added.) Hence, complaint counsel's showing that these two wholesalers were entitled to equal price treatment (Morton Salt, supra) necessarily established the factual basis for their right, under Krug, supra, to fair treatment in the matter of promotional allowances.

And there can be no doubt that this narrow question of fact was thoroughy litigated under the pricing count of the complaint. At the close of complaint counsel's affirmative case (and before respondents had commenced putting in their defense), respondents moved to dismiss the case, alleging failure to prove a prima facie case. In resisting this motion, complaint counsel relied heavily upon his proof that these two wholesalers competed with respondents. Characterizing both Hudson House and Wadhams & Co. as "wholesale grocery [firms] of Portland, Oregon," he argued that the goods they bought were "distributed to various retailers in the Portland area, which retailers compete with the retail operation of Fred Meyer, Inc., and that competitive injury *on the wholesale* [fol. 153] *level* would occur by virtue of such price differential. . . . Witnesses from Hudson House, Wadhams & Company, and a number of retail grocers who purchased through these two wholesale companies, and who competed with Fred Meyer, Inc., in the resale of such goods of like grade and quality, testified to the substantial nature of the injurious effect that such a price differential would have on the *respective businesses*," [5] i.e.,

[5] Answer to Motion to Dismiss (filed September 19, 1960), pp. 12, 13 (emphasis added). In regard to injury at the *wholesale* level, see the wholesaler testimony quoted in Opinion, p. 32, n. 48.

on the businesses of the retailers and the wholesalers. Respondents were thus put on notice, prior to presenting their defense at the hearings, that the status of these two wholesalers as injured "competitors" was a major issue in the case.

Respondents' arguments in their brief on appeal to the Commission from the examiner's initial decision,[6] and their oral argument before us, fully attest to their understanding on this point. In their brief, respondents repeatedly argued that Hudson House and Wadhams & Co., [fol. 154] while "customers" of the discriminating suppliers, were only "wholesalers" (not retailers like respondents themselves) and were thus not "competitors" of respondents.[7] On oral argument, respondents' counsel named the four non-favored customers involved in the pricing issue ("Hudson House, Wadham's, Roberts Brothers, and Lipman Wolfe"), and asserted: "Now, we can narrow this a lot further for purposes of analysis, because Hudson House and Wadham's *are wholesale grocers not in competition with respondent.*" [8]

The ultimate question of fact on this issue was, as noted, whether those two wholesalers, Hudson House and Wadhams & Co., actually sold to retailer-customers in the Portland area who, in turn, resold to Portland consumers in competition with respondents' stores. This fact was fully established. Respondents had stated in their promotional literature that they had "one [supermarket] in every neighborhood" in Portland, and one of their officials testified that "we're competing with any food store" in

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[6] The examiner specifically found that the *price* concessions had been unlawfully withheld from the two wholesalers, basing this on the proof that "Hudson House and Wadhams *resold* and *redistributed* these . . . products to retailers who were in competition with Fred Meyer, Inc." Initial Decision, p. 13 (emphasis added). In accordance with this finding, his order properly prohibited respondents from continuing to induce *prices* they know or should know are lower than those being charged "other purchasers," *including* "other purchasers" whose "customers" compete with respondents. Initial Decision and Order, Par. 1(c), pp. 27-28 (emphasis added).

[7] Respondents' brief, pp. 38, 39, 40, 43.

[8] Transcript of Oral Argument, p. 5 (emphasis added). See also pp. 25, 31.

the Portland area. The record fully corroborates this. One of these wholesalers, Hudson House, resells to more than 100 independent Portland retailers, and the other, Wadhams & Co., sells to about 40 such local retail grocers. Five of these retailers, including four that bought from Hudson House, and one that bought from Wadhams & Co., testified to the vigor of their direct competition with respondents' supermarkets. For example, the retailer that [fol. 155] bought from Wadhams & Co., testified that his store was located directly "across the street" from one of respondents' retail supermarkets. The lower prices induced by respondents (33⅓% lower than these two *wholesalers* were paying) was so great an advantage that one of Hudson House's retailer-customers, asked if he could afford to meet the price at which respondents were selling peaches to Portland consumers, replied: "No, sir. I can't even buy it at that."

Thus, the *fact* that respondents' stores compete with the retailer-customers of these two wholesalers has been at issue from the very beginning of this proceeding and has been exhaustively litigated. The fact of the matter is that these two wholesalers *do* resell to Portland retailers who *do*, in turn, resell those products, in direct competition with respondents' stores, to Portland consumers. Respondents have had every opportunity to rebut, if they could, the factual evidence on this point. The mere fact that the bulk of that evidence was received by the examiner, or considered by him, under the issues raised by the first count in the complaint does not mean that we are required to return the case to him and have him receive the very same evidence on the identical factual issue posed by the complaint's second count.[9]

[fol. 156] All that remains is respondents' contention that our view of the *law* is novel and unfounded. As

[9] It is the Commission, not the hearing examiner, that is ultimately responsible for finding the facts. Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b). While the initial performance of this duty is delegated to the examiner, the Commission, on an appeal from the initial decision of the examiner, exercises "all the powers which it could have exercised if it had made the initial decision." Rule 4.22(a), Rules of Practice, Procedures and Organization (1961).

noted above, they insisted, both in their initial brief and in oral argument before us, that these two wholesalers were "not entitled under Section 2(d) [of the Clayton Act, as amended by the Robinson Patman Act] to proportionately equal treatment." [10] We rejected that argument in our prior opinion,[11] concluding that "it ignores economic reality to say that these two wholesalers are not 'competing' with respondents in the 'distribution' of these products" when those wholesalers, "through their numerous retailer-customers, are seeking exactly the same consumer dollars that respondents are after." Accordingly, we amended the examiner's order to spell out clearly that it covers not only the situation where respondents induce promotional allowances they know or should know are not being given to their direct-buying retail competitors,[12] but also the situation where respondents induce a promotional allowance they know or should know is not being "given to a wholesaler whose customers compete with [respondents]." Krug v. International Telephone & Telegraph Corp., supra, 142 F. Supp. at 236. Now, in their [fol. 157] instant exceptions to that change we made in the order, respondents have supplemented their earlier arguments on the point with an exhaustive discussion of the reasons why they think that change was "contrary to law." Thus, the facts have been tried and the law argued.

Respondents' exceptions to the proposed order issued with the decision of the Commission in this proceeding on March 29, 1963, are rejected. That order will be adopted as the final order of the Commission.

Commissioner Elman dissented for the reasons stated in his opinion of March 29, 1963, and Mr. Higginbotham did not participate by reason of the fact that this matter was argued before the Commission prior to the time he was sworn into office.

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[10] Respondents' brief, p. 29, See n. 1, supra.

[11] Opinion, pp. 21-28, 62.

[12] As is indicated in n. 3, supra, the six competitors shown to have been denied the promotional allowances knowingly induced by respondents included four that are *exclusively* retailers (the two retail department stores Roberts Bros. and Lipman, Wolfe & Co., and the two direct-buying retail grocers, Oregon Piggly Wiggly and United Grocers).

[fol. 158]

BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

PAUL RAND DIXON, Chairman
SIGURD ANDERSON
PHILIP ELMAN
EVERETTE MACINTYRE
A. LEON HIGGINBOTHAM, JR.

Docket No. 7492

IN THE MATTER OF

FRED MEYER, INC., a corporation, and FRED G. MEYER and EARLE A. CHILES, individually and as officers of said corporation.

FINAL ORDER—July 9, 1963

Pursuant to the Commission's order of March 29, 1963, respondents having filed objections to the proposed order to cease and desist in this proceeding, a proposed alternative order, and reasons in support thereof; and counsel in support of the complaint having filed a reply thereto; and

The Commission, for the reasons stated in the accompanying opinion, having rejected respondents' objections and having further determined that its proposed order to cease and desist should be issued as the final order of the Commission:

IT IS ORDERED that respondent Fred Meyer, Inc., a corporation, and its officers, and Fred G. Meyer and Earle A. Chiles, individually and as officers of corporate respondent, and respondents' agents, representatives and employees in connection with the offering to purchase or purchase in commerce, as "commerce" is defined in the amended Clayton Act, of products for resale in outlets operated by respondents, do forthwith cease and desist from:

[fol. 159] Knowingly inducing, or knowingly receiving or accepting, any discrimination in the price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price respondents know or should know is below the net price at which said products of like grade and quality are being sold by such seller to other customers where respondents are competing with the purchaser paying the higher price or with a customer of the purchaser paying the higher price.

For the purpose of determining the "net price" under the terms of this order, there shall be taken into account all discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are effected.

IT IS FURTHER ORDERED that respondent Fred Meyer, Inc., a corporation, and its officers, and Fred G. Meyer and Earle A. Chiles, individually and as officers of corporate respondent, and respondents' agents, representatives and employees, directly or through any corporate or other device in or in connection with any purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of products for resale in outlets operated by Respondents, do forthwith cease and desist from:

Inducing and receiving anything of any value from any supplier as compensation or in consideration for services or facilities furnished by or through respondents in connection with the processing, handling, sale or offering for sale of products purchased from such supplier, when respondents know or should know that such compensation or consideration is not being affirmatively offered or otherwise made available by such supplier on proportionally equal terms to all of its other customers competing with respondents in the sale and distribution of such supplier's products, including other customers who resell to purchasers who compete with respondents in the resale of such supplier's products.

[fol. 160] IT IS FURTHER ORDERED that respondent Fred Meyer, Inc., a corporation, and its officers, and Fred G. Meyer and Earle A. Chiles, individually and as officers of corporate respondent, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist set forth herein.

By the Commission, Commissioner Elman dissenting and Commissioner Higginbotham not participating.

/s/ Joseph W. Shea
JOSEPH W. SHEA,
Secretary.

ISSUED: July 9, 1963

[fol. 161]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18,903

FRED MEYER, INC., et al., PETITIONER

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

OPINION—March 18, 1966

Petition to Review an Order of the
Federal Trade Commission

Before: JERTBERG and DUNIWAY, Circuit Judges, and
FOLEY, JR., District Judge

DUNIWAY, Circuit Judge:

This is a petition to review and set aside an order of the Federal Trade Commission which directs that petitioners, Fred Meyer, Inc. and two of its officers, all of whom we refer to as Meyer, cease and desist from conduct in alleged violation of section 2(f) of the Clayton Act, 15 U.S.C. § 13(f), and section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

These, as found by the Commission, are the facts. Fred Meyer, Inc., an Oregon corporation, operates a chain of thirteen retail supermarkets in Portland, Oregon, and the immediate vicinity, in which it sells grocery products, drugs, variety items, and a limited line of clothing. Its sales in 1957 exceeded $40 million, making it, during the relevant period, the second largest seller of all goods in the area. In 1960 it made one-fourth of all retail food sales in the Portland area, by its own claim selling to "75% of Oregon's population" through its supermarkets located "in every neighborhood."

[fol. 162] In about 1936 petitioner commenced an annual promotion, called the "coupon book promotion," beginning

in September and ending four weeks later. The mechanics of the coupon book are simple. Meyer prints a book, usually containing 72 pages, each page of which features a single product. These pages are the "coupons" and each entitles the customer to the specially reduced price there stated. The customer buys the book for the nominal sum of ten cents and must surrender the appropriate coupon when making his purchase of goods. It is a successful promotion: Meyer sold 138,700 books in 1957 and 121,270 in 1958.

The cost of the books and related advertising expenditures [1] was met only in part by revenue from their sale; the rest was supplied, in amounts approximating *total* costs, by participating suppliers who usually paid, at the very least, a flat rate of $350 per coupon page. These payments were made sometimes in cash, sometimes in price discounts on goods purchased for resale during the promotion, and sometimes by replacement of a predetermined portion of the goods so sold. Some of the suppliers further underwrote the promotion by granting volume-based reductions, replacing goods sold, or redeeming coupons in cash at an agreed rate. Certain of these, as well as other unrelated promotional payments which constitute part of the subject matter of the complaint, are detailed in Part I of this opinion.

As a consequence of the solicitation and receipt of these payments, the Commission issued a two-count complaint against petitioners. Count I, based on the coupon book promotion, charged a violation of section 2(f) of the Clayton Act by inducing and receiving "discriminatory prices, discounts, allowances, rebates and terms and conditions of sale" which they knew or should have known were granted in violation of section 2(a) of that Act. Count II charged a violation of section 5 of the Federal Trade Commission Act by the inducement of promotional aid, of the type forbidden by section 2(d) of the Clayton [fol. 163] Act, with reference to both the coupon book

[1] Total promotional expenditures of this type amounted to $23,406, or about 17 cents per book, in 1957, and not dissimilar amounts in the other years involved.

promotion and other, unrelated promotions. These statutes are set out in pertinent part in the margin.[2]

The Hearing Examiner's decision found the violations as charged. The Commission affirmed and issued the cease and desist order which, exceptions to it having been rejected, is now here for review.

Meyer raises six basic questions here, and levels a broadside attack on the sufficiency of the evidence to sustain the Commission's findings. Those questions are (1) whether the supplier payments here are cognizable at all under section 2(a), (2) whether section 2(d) requires

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[2] Clayton Act § 2, as amended by Robinson-Patman Act, 15 U.S.C. § 13:

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered:"

"(d) It shall be unlawful for any person . . . to pay or contract for the payment of anything of value to or for the benefit of a customer of such person . . . as compensation or on consideration for any services or facilities furnished by or through such customer in connection with the . . . sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

"(f) It shall be unlawful for any person . . . knowingly to induce or receive a discrimination in price which is prohibited by this section."

(References to "commerce" omitted)

Federal Trade Commission Act § 5, 15 U.S.C. § 45:

"(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful . . . ."

suppliers to refrain from discriminating among customers who occupy different functional levels or varying combinations of functional levels, (3) whether Meyer [fol. 164] knew or had reason to know of the unlawfulness of the payments it induced, (4) whether inducement of disproportionate promotional payments is cognizable under section 5 of the Federal Trade Commission Act, and (5) whether the Commission's cease and desist order was improperly directed to the corporation's officers as individuals, or (6) was improper for failure to reasonably relate to the practices found to be unlawful.

I. THE EVIDENCE.

Complaint counsel chose transactions with five suppliers —Burlington Industries, Inc., Cannon Mills Company, Tri-Valley Packing Association, Idaho Canning Company, and Phillip Morris, Inc.—during 1956, 1957, and 1958, to ground the complaint. Meyer asserts, with respect to each supplier, that the proof is vitally insufficient to support the findings. We examine the transactions seriatim, stating the facts as the Commission found them.

A. *Burlington Industries, Inc.*

Burlington participated in the 1957 and 1958 coupon book promotions, agreeing in the spring of each year to reduce its prices to Meyer by, respectively, 50-94 cents and 75 cents per dozen pairs of nylon hose. The disfavored customer, Lipman, Wolfe & Co., a Portland retail department store, received no discount on its contemporaneous purchases.

Meyer argues first that since these purchases were arranged at times separated by substantial intervals, though completed by contemporaneous purchase orders and deliveries, there cannot be that comparability which the statute demands as a basis for a finding of discrimination and injury to competition. The Commission responds that the Act contemplates competition in distribution, which it found to exist, and that the time of purchase by different customers is only evidence bearing on the existence of that competition. Its contention finds support in *Hartley & Parker, Inc.* v. *Florida Beverage*

Corp., 5 Cir., 1962, 307 F.2d 916, 921. A substantial time interval indicates only that different prices might have been caused by different market conditions, rather than by an accomplished intent to discriminate. Here the record indicates that market conditions had not changed [fol. 165] materially.[3] Such a determination is more properly for the Commission than for the courts. See *Universal Camera Corp.* v. *NLRB*, 1951, 340 U.S. 474, 488; *Carter Prods., Inc.* v. *FTC*, 9 Cir., 1959, 268 F.2d 461, 492, *cert. denied*, 1959, 361 U.S. 884. We cannot say that the determination here is not supported by substantial evidence; it is, therefore, conclusive, 15 U.S.C. §§ 21 (c), 45(c); see *Universal Camera, supra; cf.* 5 U.S.C. 1009(e) [Administrative Procedure Act § 10(e)(B)(5).] *Atalanta Trading Corp.* v. *FTC*, 2 Cir., 1958, 258 F.2d 365, cited by Meyer, is not contrary. There isolated and non-recurring sales of particular products had been made, without allowances, to competitors of the allegedly favored customer several months before and after the sales to the favored customer. The court, contrary to the Commission's construction of the law, held that these facts standing alone could not establish a prima facie case of discrimination because such a rule would force a supplier to elect to give promotional allowances at the time of the first sale of a product or not at all, a result which would "stifle rather than encourage competition and have the practical effect of outlawing all promotional allowances." *Id.* at 371. But here the sales are of a single, fairly standardized item, widely sold in the area, and recur frequently during the years involved. Hence *Atalanta* is not controlling.

Meyer next contends that the evidence fails to show that the hosiery purchased by it and by Lipman, Wolfe was of "like grade and quality," (15 U.S.C. § 13(a), *Atalanta Trading Corp.* v. *FTC*, 2 Cir., 1958, 258 F.2d 365, 369-70) asserting that the fact that it had entered additional specifications on its purchase orders compels

[3] The Commission has, in fact, found sales to two competitors three and a half months apart sufficiently comparable on "a showing of continuous sales of regularly promoted items," *Joseph A. Kaplan & Sons, Inc.*, 1963, FTC Dkt. 7813, CCH Trade Reg. Rep. ¶ 16,666.

the conclusion that a different grade and quality resulted. However, the record fails to show that these changes, if in fact made, produced any difference in the marketability, appearance, durability, cost or manner of manufacture, or other indicia of "grade and quality" of the goods. Moreover, in Burlington's invoices to both customers the hose are identified by identical style numbers. This, we think, is sufficient to permit the inference that the goods themselves were identical. *Cf. Central Paper Co.* v. *Southwick*, 6 Cir., 1932, 56 F.2d 593, 597-98; *Straus* v. *Victor* [fol. 166] *Talking Machine Co.*, 2 Cir., 1924, 297 Fed. 791, 804-05; see also *United States* v. *Bryan*, 1950, 339 U.S. 323, 332. That each customer specified and received private label packaging does not, without more—and "more" is lacking here—change that conclusion. See *Hartley & Parker, Inc.* v. *Florida Beverage Corp.*, 5 Cir., 1962, 307 F.2d 916, 923.[4]

Finally, Meyer makes much of the disparity in quantities purchased by it and by Lipman, Wolfe & Co., asserting that by reason of such disparity a presumption of cost justification arises which complaint counsel should but failed to rebut. Such arguments are properly addressed to the proposition that Meyer had no knowledge or reason to know that the allowances it received were discriminatory, and so we relegate consideration of them to that portion of this opinion.

B. *Cannon Mills Company.*.

Cannon Mills is said to have violated sections 2(a)[5] and 2(d) of the Act by granting, at Meyer's instance, a

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[4] The Commission has long held that brand differences alone do not necessarily compel the conclusion that the products are not of "like grade and quality" and that brand identity may overcome insignificant physical differences in the goods or their containers, see Rowe, Price Discrimination Under the Robinson-Patman Act 69-73 (1962, Supp. 1964) and cases cited there.

[5] A subsequent proceeding against Cannon Mills, *Cannon Mills Co.*, FTC Dkt. 7494, 3 CCH Trade Reg. Rep. ¶ 16,878 (1964), resulted in dismissal of the complaint because competitive injury had not been shown. The Commission therefore here refrains from relying on these alleged violations insofar as the section 2(a) charge is concerned.

10 cents per dozen allowance on fingertip towels sold during the 1956 promotion. These towels, regularly sold at retail for 23 cents each, were advertised for sale at 7 for $1.00. Meyer purchased 2,000 dozen in March and another 5,500 dozen in October of 1956, while Roberts Brothers, the Portland retail department store allegedly discriminated against, purchased a total of 600 dozen (bearing the same style number as those purchased by Meyer) in April, June, and November of that year.

Meyer again claims that identity of style numbers on billing invoices is insufficient proof of likeness of grade [fol. 167] and quality. For the reasons already set out, we disagree. The Commission was justified in concluding that the towels were identical.

A somewhat more substantial question is raised by the claim that the record fails to show simultaniety of stocking, handling, or resale of the towels, hence the required competition has not been proved. But again we think that the Commission, more expert than we in the mechanics of retail merchandising, could and did reasonably conclude that such competition existed. A knowledgeable witness, in fact, so testified, and we have previously held substantially identical evidence sufficient to uphold a similar finding, *Tri-Valley Packing Ass'n* v. *FTC*, 9 Cir., 1964, 329 F.2d 694, 701.

C. *Tri-Valley Packing Association.*[6]

The Commission's case here is that Meyer purchased, for the 1957 coupon book promotion, 2,200 cases of its private label "My-Te-Fine" fancy grade sliced and halved peaches from Tri-Valley, concededly at the same time that Hudson House, a disfavored wholesaler, purchased 175 cases of identically described merchandise under its own private label from the same source. Tri-Valley agreed to pay Meyer $350 (in merchandise or cash, at its option) for a coupon page and to redeem, in merchandise, every third can sold on the coupon's "Buy two cans and get one free" offer. No such offer was made or made available on proportionally equal terms to Hudson House.

[6] We have previously considered Tri-Valley's participation in Meyer's 1957 coupon book promotion, see *Tri-Valley Packing Ass'n* v. *FTC*, 9 Cir., 1964, 329 F.2d 694, 707-10.

Meyer again founds its attack on the proposition that "like grade and quality" were not sufficiently proved, pointing to evidence in the record tending to show that the quality of peaches sold under the general classification of "fancy" varies according to where, when, and by whom the peaches were grown and packed.

But a Portland retailer witness specifically testified that he competed directly, in peaches of the grade and quality purchased from Hudson House, with a nearby Meyer store. And the fact that the goods were identically described on the supplier's invoices to Meyer and to Hudson House sufficiently establishes commercial identity [fol. 168] or commercial fungibility, which is all that the Robinson-Patman Act demands.[7] To require the level of proof for which Meyer contends would be to require the impossible.

Meyer further argues that the proof is insufficient because it is not shown that these Tri-Valley peaches made their way to customers of Hudson House. We agree. *Tri-Valley Packing Ass'n, supra,* at 708-11, made it clear that competition at the same functional level must be shown. Here, Meyer, an integrated operation, and Hudson House, a wholesaler, do not compete at the same functional level, hence Tri-Valley goods must be directly traced to Hudson's customers to show that Tri-Valley has dealt "directly" with them, that they are "indirect customers" of Tri-Valley and therefore in competition with Meyer in the sale of comparable goods. *Ibid.*[8] That has not been shown. In consequence, the proof must be held insufficient as to a 2(d)-2(f) charge involving Tri-Valley. Whether it is insufficient support for a 2(a)-2(f) charge

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[7] *Cf. Bruce's Juices, Inc.* v. *American Can Co.*, S.D. Fla., 1949, 87 F. Supp. 985, 987, *aff'd*, 5 Cir., 1951, 187 F.2d 919, 924. See also *Moog Indus., Inc.* v. *FTC*, 8 Cir., 1956, 238 F.2d 43, 49-50, *aff'd*, 1958, 355 U.S. 411.

"The 'like grade and quality' concept . . . was designed to serve as one of the necessary rough guides for separating out those commercial transactions insufficiently comparable for price regulation by the statute." Report of the Attorney General's National Committee to Study the Antitrust Laws 157-58 (1955).

[8] See Rowe, Price Discrimination Under the Robinson-Patman Act, § 13.11 at p. 398-99 (1962, Supp. 1964) and cases there cited.

or for a Federal Trade Commission Act § 5 charge is considered later in this opinion.

D. *Idaho Canning Company.*

Meyer does not, as it cannot, dispute the sufficiency of proof of simultaniety of sale and comparability of grade and quality of canned corn sold to Meyer and to Hudson House and Wadhams & Co., the nonfavored wholesaler purchasers. Idaho Canning's participation in Meyer's 1957 coupon book promotion consisted of payment in merchandise of $350 for a coupon book page and redemption in free goods of coupons received by Meyer offering one free can of corn for every two purchased, a transaction substantially identical with that of Tri-Valley. Idaho's [fol. 169] participation was solicited by Meyer, and it made no comparable offer to Hudson House or Wadhams & Co.

Equally here, the proof is vitally insufficient to support a 2(d)-2(f) charge in that the goods were traced only to the wholesaler. Robinson-Patman doctrine has not yet progressed to a point which allows the Commission to infer an "indirect customer" relationship from the mere fact that goods were supplied to a middleman, at least where those goods became inextricably mixed with other, identical goods purchased from other suppliers before their resale to retailers. No more than that has been proved here.

E. *Phillip Morris, Inc.*

The complaint charges violations involving Phillip Morris of § 2(d) and of § 5 of the Federal Trade Commission Act, but not of § 2(a). These alleged violations were the solicitation and receipt by Meyer of (1) a $500 payment for participation in Meyer's 1956 "Gift Days" promotion; (2) a $400 payment on April 26, 1957 in connection with Meyer's 1957 "Thrift Days" promotion; (3) a payment of $800 (received on October 24, 1956) for Meyer's promotion of Parliament cigarettes during September, 1956; and (4) payment of $150 per month during most of 1956 for promotion of Phillip Morris tobacco products. Meyer does not contend that the pay-

ments were not made. It does say, however, that mere proof of payments is insufficient proof of a § 2(d) violation in the absence of a showing that proportionally equal payments were not made to competitors.

The evidence before the Commission on this point is indeed scanty. Meyer's tobacco buyer testified that she had initiated the negotiations leading, upon submission of bills to Phillip Morris, to receipt of these payments. A Phillip Morris representative characterized these payments, by implication, as "special deals." He testified that these "special deals" were not offered to his company's customers as a matter of course nor publicized in any way, and that he could not recall offering similar proposals to customers other than Meyer. The general manager of Oregon Piggly Wiggly Company, an allegedly disfavored Portland retailer, testified that that organization had received no promotional allowances from Phillip [fol. 170] Morris in or for promotional activities during September, 1956 and that the only payment received [9] during the months of March through May of 1957 was a $357.75 contribution toward the cost of soft drinks given away on the sale of cigarettes. Testimony of personnel of United Grocers, the other Portland purchaser allegedly discriminated against, was to the general effect that that organization had received no promotional allowances during 1956 and 1957 other than the tobacco industry's normal promotional payments adverted to in note 9, *supra*.

On the basis of this evidence, the Commission concluded that the payments received by Meyer were *in addition to* "regular" promotional payments, that they were not made proportionally available to other, competing retailers of the same goods, and moreover, that they were "virtually incapable of being offered on proportionally equal terms." We cannot say that that conclusion was erroneous as a matter of fact.[10]

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[9] We do not concern ourselves here with the regularly-advertised, volume-based promotional allowances which both parties concede were made proportionally available.

[10] "A course of conduct under which a seller fails to inform respecting such compensation or make known his terms or otherwise

This instance merely points out two factors common to Commission proceedings and to our review of them. First, those witnesses in possession of the most enlightening evidence are usually representatives of respondents or potential respondents, who have an interest in revealing only what they must and in volunteering nothing. Second, application of the Commission's reserve of expertise to this sometimes painfully extracted testimony may produce conclusions, and valid conclusions, quite different from those which an uninitiated fact-finder might reach. And, of course, the Commission and its Hearing Examiner are closer to the facts than we are, and we cannot discount the justifiable effect which weak and evasive responses, apparent even on the face of this cold record, may have had on them. It is worth noting, for example, that while [fol. 171] the Commission set aside many of the conclusions of the Examiner here, it is agreed with him that the Phillip Morris payments were not offered to other purchasers on a proportionally equal basis; both opinions relied heavily, perhaps primarily, on the testimony of Phillip Morris' representative, who nowhere testified affirmatively to such a state of facts. In sum, the evidence is weak but not insufficient.

Meyer, however, attacks on other grounds, claiming that the Commission erred in classifying United Grocers as a retailer rather than a wholesaler. If this is true, then it and Meyer compete at different functional levels and, according to petitioner, therefore there is no obligation on Phillip Morris (under *Tri-Valley Packing Ass'n, supra*) to offer it proportionally equal promotional benefits.

There is a broad gamut of possible organization of functions, and in that range a buying cooperative such as United Grocers may function as an agent of each retailer-member, as a wholesaler, or as something between

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to offer them to one customer while granting payment for services to his rival reseller essentially represents concealment. In such case, the credit or allowance is not 'available' to the unfavored competitor, for all practical purposes a withholding and denial of opportunity to share occur, and the law is violated." *Kay Windsor Frocks, Inc.*, 1954, 51 F.T.C. 89, 95. *Cf. Vanity Fair Paper Mills, Inc.* v. *FTC*, 2 Cir., 1962, 311 F.2d 480, 484-86.

those extremes. We think that, within limits, classification here is in the province of the finder of fact. While we have some difficulty accepting the Commission's conclusion that United Grocers is "plainly" a retailer,[11] we find it unnecessary to decide the question ourselves since we uphold the Commission's finding of discrimination against Oregon Piggly Wiggly Company, concededly in functional competition with petitioner.

The question of law which accompanies the foregoing factual determination, whether a 2(d) violation may exist where the favored and nonfavored customer inhabit different functional levels, was settled in Meyer's favor in *Tri-Valley Packing Ass'n* v. *FTC, supra.*

[fol. 172]

II. ARE THE PAYMENTS RECEIVED FROM SUPPLIERS IN CONNECTION WITH THE COUPON BOOK PROMOTIONS COGNIZABLE UNDER SECTIONS 2(a) AND 2(f) OF THE CLAYTON ACT?

Meyer tenders, as the first of two "threshold questions," the proposition that no part of the payments here made by Burlington Industries, Tri-Valley, and Idaho Canning can be held violative of section 2(a) of the Clayton Act. This conclusion, it says, is compelled by the facts that "(1) the coupon book promotion was an institutional promotion involving a combination of advertising and promotional services furnished by or through Fred Meyer 'in connection with the processing, handling, sale or offering for sale' of the individual supplier's products, and (2) the payment of each supplier was made pursuant to agreement with Fred Meyer which contemplated, and was tied directly to, the furnishing of promotional services and facilities by Fred Meyer in connection with the resale of the products of the participating suppliers." It reasons that the "ultimate legal question here involved" is whether

[11] The organization and operation of United Grocers, as reflected in this record, seems quite similar to that of Central Grocers, Inc., a quasi-cooperative owned by its retailer-members, which we treated as a wholesaler in *Tri-Valley Packing Ass'n* v. *FTC, supra,* at 706-10.

the payments made are to be classified as price reductions (cognizable under 2(a) and therefore under 2(f)) or promotional payments, that the latter classification is the proper one, and therefore that the purported violations are cognizable if at all only under section 5 of the Federal Trade Commission Act. Several subsidiary arguments are advanced as well, and will be examined below.

Commission counsel respond that sections 2(a) and 2(d) are not mutually exclusive, that in fact they overlap in such a manner as to bring the payments here under the prohibition of both sections. There is some support in the commentators and case law for this position, see Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act 126 (2d ed. 1959); *cf. Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 8 Cir., 1945, 150 F.2d 988, 990, 993, *cert. denied*, 326 U.S. 773; *Sun Cosmetics Shoppe* v. *Elizabeth Arden Sales Corp.*, S.D. N.Y., 1949, 82 F.Supp. 687, 688, *rev'd on other grounds*, 2 Cir., 1949, 178 F.2d 150; Conference Report, H.R. Rep. No. 2951, 74th Cong., 2d Sess. at 5.

However, it is not necessary that that question be decided here. We agree with the Commission that a multi- [fol. 173] partite transaction may in its separate parts violate separate prohibitions of the Robinson-Patman Act. So here. The Commission found that the first $350 payment by each supplier constituted a true promotional payment for which it received value in Meyer's promotional services rendered, and that the balance of each payment, tied as it was to the volume of goods sold and ranging in amount up to one-third of the regular price to Meyer of those goods, constituted a distinct price discrimination, cognizable under section 2(a). We cannot agree with Meyer that the Commission made this classification "arbitrarily." While it claims that the Commission erred in finding that all participating suppliers paid a flat rate of $350 per coupon book page, it does concede that a very substantial percentage of suppliers paid this or some similar flat rate. And while it is correct in asserting that services rendered need not be shown precisely to equal promotional payments received, see *Giant Foods, Inc.*, 1961, 58 F.T.C. 977, 1010; *Lever Bros.*, 1953, 50 F.T.C.

494, 511, the relationship between payments received and promotional services rendered cannot be unreasonable, see *Giant Foods, Inc., supra.* Here the payments received from Tri-Valley in 1957 exceeded $350 by $4,814 (20,750 coupons redeemed in merchandise at $.232 per coupon), from Idaho Canning in 1957 by $2,585 (21,367 coupons redeemed at $.121), from Cannon Mills in 1956 by about $400, and from Burlington Industries in 1957 and 1958 by a total of about $2,800. In view of such substantial disparities between receipts and proved allocable expenses, we think the Commission correctly decided that these excesses were "outright price concessions" and, since the amounts were directly related to and dependent upon the amount of goods purchased and resold by Meyer, price concessions cognizable under section 2(a) rather than under section 5 of the Federal Trade Commission Act. *Cf. National Tea Co.*, 1950, 46 F.T.C. 829, *order modified*, 1951, 47 F.T.C. 1314.

But, says Meyer, the Commission itself has determined, in proceedings against these suppliers, that some of the payments we consider here were promotional, not price concessions. This contention has no substance. We cannot concern ourselves with questions of Commission strategy or Commission decisions as to whom to prosecute and for what acts. Even a successfully completed proceeding against a supplier for a 2(d) violation would not neces- [fol. 174] sarily foreclose a contemporaneous or subsequent action against an inducing buyer for a 2(a)-2(f) violation where the payments involved violate both sections.

III. DOES SECTION 2(d) OF THE CLAYTON ACT REQUIRE A SELLER TO OFFER PROPORTIONALLY EQUAL BENEFITS TO ITS CUSTOMERS AT DIFFERENT FUNCTIONAL LEVELS?

This is the second "threshold question" asserted by Meyer. The Commission concdes that, to sustain the position taken by it in its opinion, we would have to "reconsider" our decision in *Tri-Valley Packing Ass'n, supra*, where we held, on facts essentially identical with those

produced here, that "no section 2(d) violation was shown as to the wholesale operation of Hudson House, because that operation was not in functional competition with Meyer . . .", *id.* at 710. However, it urges us to overrule *Tri-Valley* because, it says, the issue was not fully briefed or argued there, the result was plainly contrary to the language of the Clayton Act and was other than that intended by Congress when it passed the Robinson-Patman Act, and the effect of the case was to immunize a practice intended to be stamped out by that legislation, specifically, the bringing to bear of the economic power of the chains upon suppliers to wring from them prices lower than smaller and less powerful unorganized retailers can extract.

But the issue was considered and considered at length, as a reading of that opinion demonstrates, the "intent" of Congress is not as clear as respondent asserts, and no concrete showing of any increase in abuse by large buyers of their inherent power has been made here. Consequently, we are not inclined after so short a time to re-examine that decision, and adhere to the result reached there.

IV. DID MEYER KNOW OR HAVE REASON TO KNOW THAT THE CONCESSIONS IT INDUCED WERE DISCRIMINATORY AND UNLAWFUL?

The Commission found that Meyer knew or had reason to know that the payments it received were unlawful. That is one of the elements of proof required by section [fol. 175] 2(f) and given content by *Automatic Canteen Co. v. FTC*, 1953, 346 U.S. 61, 79-81. The Court also held that the ordinary elements of a section 2(a) case must be shown. As explained below, we think the 2(a) elements have been adequately proved, and that the only serious question is as to Meyer's knowledge. That, too, we resolve in the Commission's favor.

A. *The necessity of "pressure" or coercion.*

Meyer seems to take the position that the Commission must establish that the buyer exerted "pressure", see *Automatic Canteen, supra*, at 79, amounting to outright

extortion, conceding that in that case the coercion would render the buyer's claimed lack of knowledge culpable, see *American News Co.* v. *FTC*, 2 Cir., 1962, 300 F.2d 104, 107. We think that *Automatic Canteen* does not go so far.

First, we do not understand the Court to have gone beyond the simple statutory requirement of "inducing" (and clearly petitioner "induced" the payments it received here); we take its words as being more of description than of measurement. Second, "pressure" may be brought to bear in a variety of ways, overt and covert, and petitioner here obviously applied some pressure. This, the fact of Meyer's self-professed market power, and the Commission's superior fact-finding position are sufficient to persuade us not to declare groundless its finding that, whatever may be the degree of "pressure" necessary to sustain a 2(f) violation, that pressure existed and was successfully applied.[12]

[fol. 176]

B. *The effect of quantity differences.*

Next, Meyer points to *Automatic Canteen's* requirement that where the quantities sold to the favored and non-favored buyers are not the "same"—which we interpret as meaning substantially the same—the Commission must only show that such differences could not give rise

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[12] We need not finally decide here whether actual coercion is necessary to establish the prima facie case, nor do we intimate any view on the result should such overt coercion not be shown.

We do note, however, that the Congress was aware at the time of passage of the Robinson-Patman Act that "it is the manufacturer's recognition that the chain, with its tremendous purchasing and distributing power, may do those things ["buy the goods elsewhere, proceed to manufacture its own, or conduct its stores so as to discourage therein the sale of the recalcitrant manufacturer's goods"] and not the 'threat' of the chain to do them that is the real inducement for granting the special concession." *Final Report on the Chain-Store Investigation*, S. Doc. No. 4, 74th Cong., 1st Sess., p. 49 (1934).

As to violations of § 5 of the Federal Trade Commission Act, no showing of "coercion" is necessary. *R. H. Macy & Co.* v. *FTC*, 2 Cir., 1964, 326 F.2d 445, 447.

to "sufficient [cost] savings . . . to justify the price differential" and that the buyer should have so known. Meyer insists that the quantity differentials are too great here to permit the Commission's inference that Meyer had reason to know that the differentials could not be cost-justified, and therefore that Count I of the complaint must fall.

Those quantity differences were indeed large; large enough, we assume, to cast on the Commission the burden of showing that petitioner knew or should have known that they still could not be cost-justified. Was that burden carried here? We think it was. The Commission relied on several factors in reaching its conclusion that Meyer had reason to believe[13] that its suppliers could have no cost justification defense. First, none of the suppliers involved grant quantity discounts. Second, Meyer itself pays the going price during the other eleven months of the year. From this the Commission infers, and fairly, that no measurable cost savings are produced by petitioner's somewhat larger sales and related purchases during the one-month promotion.[14] It buttresses that conclusion by a similar inference drawn from the fact that, during those eleven months, Meyer's sizeable purchases and its competitors' substantially smaller purchases are made at the same price. Third, the price concessions Meyer obtained from Idaho Canning and Tri-Valley amounted to a full third of the regular price. This, with and particularly against the background of the other two factors, led [fol. 177] the Commission to the conclusion that petitioner "should have known" something was amiss. We cannot say that inference is unwarranted. That the Commission did not prove the costs of the suppliers is immaterial.

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[13] The inquiry here was devoted to ascertaining this fact, not to whether cost justification did or did not exist in fact. No cost studies were introduced by either party.

[14] Meyer suggests but failed to prove that its sales during the balance of the year were significantly lower. Such a failure to introduce evidence within its possession probably strengthens and certainly cannot weaken the Commission's conclusion. See *Mammoth Oil Co.* v. *United States*, 1927, 275 U.S. 13, 52; *cf. Vanity Fair Paper Mills, Inc.* v. *FTC*, 2 Cir., 1962, 311 F.2d 480, 485-86; 2 *Wigmore, Evidence*, p. 164 (3d ed. 1940).

Cost surveys are expensive and labyrinthine proceedings whose results are often dependent upon the cost accounting theory used. To require them in all proceedings, even against buyers, would too often be an exercise in futility. At least where the facts and the inferences to be drawn are as clear as they are on this point, we think the method of proof adopted by the Commission here is appropriate to its end, that of showing that the buyer "is not an *unsuspecting recipient* of prohibited discriminations," *Automatic Canteen, supra,* at 81. (Emphasis added.)

Obedient to the command of *Automatic Canteen,* the Commission also inquired into possible cost differences to the seller in "sale or delivery," *id.* at 80. However, in finding that there were no such savings, it relied only on (1) testimony of Meyer's employees to the effect that the increased purchases for the promotion resulted in no changes in Meyer's costs or procedures which might provide cost savings for the suppliers and (2) testimony of a supplier's employee which we think unsatisfactory. Meyer attacks the sufficiency of this evidence, pointing to other evidence in the record which does tend to show that its suppliers' methods of sale and intensity of sales effort differed as between Meyer's regular purchases and special promotion purchases. But we believe that the Commission could find, from the *elements* of the testimony referred to above, that Meyer continued for the most part to purchase in usual method, on its usual terms, and that such differences as might have existed were inconsequential.

In summary, we consider that the evidence which supports the Commission's finding that Meyer had reason to believe that the discriminatory terms and prices it received were not cost-justified is weak but not insufficient. This conclusion is buttressed by the fact that *Automatic Canteen* itself pointed out that "the showing of knowledge . . . will depend to some extent on the size of the discrepancy between cost differential and price differential . . . . A showing that the cost differences are very small compared with the price differential should be sufficient." *Id.* at 80. Here the Commission had before it evidence from which it could infer that manufacturing, selling and

[fol. 178] delivery cost savings were negligible. The price differential amounted to as much as one-third of the regular price. That, in the circumstances of this case, is enough to satisfy *Automatic Canteen's* requirement of a cost/price comparison.

C. *Competitive injury.*

Meyer also questions the reasonableness of the Commission's finding of competitive injury. It cites *American Oil Co.* v. *FTC*, 7 Cir., 1963, 325 F.2d 101, 106, *cert. denied*, 377 U.S. 954 to support its conclusion and claims that the Commission's dismissal of a related proceeding, *In re Cannon Mills Co.*, 1964, 3 CCH Trade Reg. Rep. ¶ 16,878, on this ground constitutes an "acknowledge-[ment] that the nature of the concessions received by Fred Meyer for the coupon promotions were not such as to create a reasonable probability of substantial injury to competition within the meaning of section 2(a)."

But *American Oil* is not such substantial support as Meyer thinks. There a section 2(a) charge grew out of a retail gasoline price war, during the course of which American supplied its dealers in the battle zone at lesser prices than those it charged elsewhere. The conflict raged for only 17 days and every station in the area participated. On these facts the court held that only slight and non-recurring injury below the statutory level of notice took place and that it would have taken place whether or not American had lowered its own prices. The case is obviously different where the discrimination recurs regularly and has a substantial impact upon competition. This is the situation here. We think this case is closer to those systematic and permanent discriminatory pricing systems held invalid in such cases as *FTC* v. *Morton Salt Co.*, 1948, 334 U.S. 37 (discriminatory volume discounts) and *Corn Prods. Ref. Co.* v. *FTC*, 1945, 324 U.S. 726 (systematic discrimination based on "phantom" freight charges and other factors) than to the one disclosed by *American Oil*, and so affirm the Commission's conclusion.

D. *The duty of inquiry.*

The Commission held that "a buyer who initiates a promotional service and induces his suppliers to pay him for

performing it has possessed himself of "information suffi-
[fol. 179] cient to put upon it the duty of making inquiry to ascertain whether the suppliers were making such payments available on proportionally equal terms to [his] competitors,'" relying on, inter alia, *Giant Foods, Inc.* v. *FTC*, D.C. Cir., 1962, 307 F.2d 184, 187, *cert. denied*, 1963, 372 U.S. 910. The consequence of such a rule is that where sufficient facts exist, the buyer has that knowledge which section 2(f)—and F.T.C. Act § 5, under the general assimilation of Robinson-Patman standards of liability and proof—requires. Meyer attacks that holding on a variety of grounds.

First, it says, that rule is applicable only where the buyer's receipt of payments is "culpable," and cites a number of cases[15] for the proposition that "there is a presumption that men obey the law." But knowledge of probable illegality is equivalent to "culpability", *American Motor Specialties, Inc.* v. *FTC*, 2 Cir., 1960, 278 F.2d 225, *cert. denied*, 364 U.S. 884; *cf. Giant Foods, Inc.*, *supra*, and Meyer had knowledge of at least sufficient facts to create a reasonable suspicion that the payments it received were probably illegal. Hence the "presumption" whose benefit Meyer claims cannot apply. Rather, the duty to inquire arises. *Giant Foods, Inc.* v. *FTC*, *supra;* see *Grand Union Co.* v. *FTC*, 2 Cir., 1962, 300 F.2d 92, 100; *American News Co.* v. *FTC*, 2 Cir., 1962, 300 F.2d 104, 110, *cert. denied*, 371 U.S. 824.

Second, Meyer claims error in the stated grounds for the Commission's finding that Meyer must have known the payments it received to be incapable of proportionalization. The Commission here appears to have relied on statements in petitioner's solicitation material requiring that "Offer Must be Exclusive at Fred Meyer During the 4 Week Period" and asserting that its coupon book scheme represented a "unique" promotional device, in reaching its conclusion that the coupon book payments *could not be*

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[15] *United States* v. *Detroit Lumber & Timber Co.*, 1906, 200 U.S. 321; *Athens Roller Mills, Inc.* v. *Commissioner*, 6 Cir., 1943, 136 F.2d 125, 128; *Fidelity & Deposit Co.* v. *Grand Nat'l Bank*, 8 Cir., 1934, 69 F.2d 177, 183; *St. Joseph Stockyard Co.* v. *United States*, 8 Cir., 1911, 187 Fed. 104, 106.

proportionalized. It found support for this and for its holding that Meyer must have known that the payments solicited from Phillip Morris were disproportional in *Giant Foods, Inc., supra,* at 187. There an agreement in [fol. 180] the buyer's promotional contracts with its sellers that "This contract does not alter or replace currently existing agreements between Giant Food Department Stores and participating manufacturers," was interpreted to mean that "Giant's program was designed to exist independently of and/or coextensively with any of its suppliers' regularly available cooperative advertising programs." [16] While we do not agree that a supplier could never proportionalize benefits to its other customers while participating in a program of the degree of "uniqueness" shown here, we do hold that in the circumstances, the Commission could find that benefits here could not be proportionalized, or at least that Meyer had reason to know of the high degree of unlikelihood that they could be. As the Commission's opinion points out, Meyer itself, for almost 30 years, has considered a four-week span in September and October to be the most propitious time for a promotion of this nature. Consequently a supplier's agreement with another customer to enter into an identical agreement at another time presumably would not result in equal benefit to either. And by petitioner's own claim, the coupon book plan assures the supplier of "mass distribution of your product at the lowest possible cost." In the absence of contrary evidence, *cf. R. H. Macy & Co.* v. *FTC*, 2 Cir., 1964, 326 F.2d 445, 450, the Commission was clearly entitled to take Meyer at its word and to draw the obvious inferences.

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[16] Meyer claims that the Commission was not entitled to rely on the material which we have quoted from its solicitations for participation for the reasons that "the record . . . contains no explanation of the meaning, purpose, or operation of the language." But *for that very reason* we think the Commission was entitled to rely on the plain meaning of the words. Meyer was in a better position than anyone else to show that the words do not mean what they seem to say. Therefore it should bear the burden of disproof, under balancing of convenience and fairness, see *Automatic Canteen, supra.*

Third, Meyer argues that the record shows only that it operated an extensive information-gathering system, not that it learned by that system who its competitors in the sale of the goods involved here were nor what prices they actually paid. Therefore, it says, it could not know that it was receiving discriminatory prices, and the whole complaint must fall.

The Commission characterized Meyer's investigative activities as a "vigorous intelligence network," finding that [fol. 181] Meyer regularly monitored all grocery retailer advertisements on both a local and national scale, engaged in "comparison shopping" of competitive stores, purchased and tested competing goods, and regularly reviewed price bulletins distributed by suppliers and brokers serving the area.

It must be remembered that the inquiry here is as to what petitioner knew *or had reason to know*. Meyer obviously had a great deal of the trade knowledge referred to in *Automatic Canteen, supra*. It is a fair inference that it was aware that, as several witnesses testified, both wholesalers and retailers in the grocery industry operate on a profit margin approximating 2%, that mark-ups on the goods in question are often lower than the price concessions it received, and that customers can be "switched" from one retailer to another simply by reason of a few cents' difference in price on particular items. Meyer itself carefully required of its special promotion suppliers that "Offer Must Be Exclusive at Fred Meyer During the 4 Week Period."

Against this background the mere fact that the record fails to show exact knowledge by Meyer of the precise identity of each competitor in each particularized kind and grade of goods and of the prices paid by competitors for them cannot avail the petitioner: It had "reason to know." See *Giant Foods, Inc.* v. *FTC, supra; Grand Union Co.* v. *FTC, supra; American News Co.* v. *FTC, supra; cf. Automatic Canteen Co.* v. *FTC, supra*, at 79-80; *Tri-Valley Packing Ass'n* v. *FTC, supra*, 329 F.2d at 708-09.

V. DOES FEDERAL TRADE COMMISSION ACT § 5 REACH INDUCEMENT OF DISCRIMINATORY PROMOTIONAL ALLOWANCES?

We must resolve, for the first time in this circuit, the question whether the Commission may proceed against a buyer under § 5 of the Federal Trade Commission Act for inducing and receiving a discriminatory promotional allowance, a practice not expressly declared unlawful, as to buyers, by the Robinson-Patman Act, nor to sellers where, as here, the discrimination is among purchasers at different functional levels of competition. *Tri-Valley Packing Ass'n* v. *FTC*, 9 Cir., 1964, 329 F.2d 694, 708. The Commission takes the position that it has such power. Meyer disagrees.

[fol. 182] This is not an entirely novel question; two other Courts of Appeals have considered similar problems and side with the Commission, see *R. H. Macy & Co.* v. *FTC*, 2 Cir., 1964, 326 F.2d 445; *Giant Foods, Inc.* v. *FTC*, D.C. Cir., 1963, 307 F.2d 184, *cert. denied*, 1963, 372 U.S. 910; *American News Co.* v. *FTC*, 2 Cir., 1962, 300 F.2d 104, *cert. denied* 371 U.S. 824; *Grand Union Co.* v. *FTC*, 2 Cir., 1962, 300 F.2d 92; see also *FTC* v. *J. Weingarten, Inc.*, 5 Cir., 1964, 336 F.2d 687, 693, *cert. denied*, 1965, ... U.S. ..... No case has rejected the result these circuits have reached. We find the reasoning of those cases persuasive, and adopt it. We therefore sustain the Commission here.

VI. THE COMMISSION'S ORDER.

Finally, Meyer challenges both the scope of the resulting order and the fact that it is addressed to the two senior officers of the corporation as well as to the corporation itself.

A. *The Officers.*

According to Meyer, the facts are that Fred G. Meyer, the chairman of the board of directors of Fred Meyer, Inc., owns only a minority of the outstanding shares (38.35%), "has nothing to do with the advertising and sales policies of the corporate petitioner," and "is not even familiar with the operation of the coupon book pro-

gram." Earle A. Chiles, petitioner's president, concededly is "generally responsible for merchandising operations, but only at a policy-making level," and owns 14.37 percent of the stock. These facts, it claims, are insufficient to support an order running directly to these men as individuals and officers of the corporation.

When these attributes are taken singly, petitioner's position may in some circumstances be correct, see *Ostermoor & Co.* v. *FTC*, 2 Cir., 1927, 16 F.2d 962; *In re Maryland Baking Co.*, 1956, 52 F.T.C. 1679, 1691. But the Commission found that this, a "family" corporation (the individuals and their families own almost all of the corporate stock), was "nothing but the 'alter ego' of those two individual respondents." Moreover, Chiles himself testified that "we set the policies and review the practices." And Meyer was originally responsible for instituting the coupon book promotion. We think that, despite Meyer's denials of knowledge of the operations of the [fol. 183] business, the Commission was justified in concluding that "if 'a majority of Portland's 120,000 families' were apprised of the details of these programs, we think it is fair inference that the Chairman of the Board also knew about them," [r. 138.] and in joining both as respondents. See *Mandel Bros., Inc.* v. *FTC*, 7 Cir., 1958, 254 F.2d 18, 22, *rev'd on other grounds*, 1959, 359 U.S. 385; *cf. Western Fruit Growers Sales Co.* v. *FTC*, 9 Cir., 1963, 322 F.2d 67, 69-70, *cert. denied*, 376 U.S. 907.

B. *The Scope of the Order.*

The Commission's Final Order commands that the corporate petitioner and its two named officers cease and desist from

> "Knowingly inducing, or knowingly receiving or accepting, any discrimination in the price of such products by directly or indirectly inducing, receiving, or accepting from any seller a net price respondents know or should know is below the net price at which said products of like grade and quality are being sold by such seller to other customers where respondents are competing with the purchaser paying the higher price or with a customer of the purchaser paying the higher price."

This we refer to as the 2(a)-2(f) order. They are further ordered to cease and desist from

> "Inducing and receiving anything of any value from any supplier as compensation or in consideration for services or facilities furnished by or through respondents in connection with the processing, handling, sale or offering for sale of products purchased from such supplier, when respondents know or should know that such compensation or consideration is not being affirmatively offered or otherwise made available by such supplier on proportionally equal terms to all of its other customers competing with respondents in the sale and distribution of such supplier's products, including other customers who resell to purchasers who compete with respondents in the resale of such supplier's products."

This we refer to as the § 5 order. Meyer attacks both orders on the grounds that they bear no reasonable relationship to the practices found to be unlawful and that they fail to mention or limit themselves to the coupon [fol. 184] book promotion. Moreover, it says, the 2(a)-2(f) order is too broad in that it is not confined to the narrow product categories in suit, and because (as we make out the argument) Meyer might not know that products of like grade and quality being sold in competing outlets were sold to those outlets by its own seller. The section 5 order is claimed to be improper because it is not limited to the specific unlawful practices found here and because it applies to "other customers who resell to purchasers who compete with respondents," *i.e.*, those wholesalers whom we held to be not under the protection of section 2(d) in *Tri-Valley Packing Ass'n, supra.*[17]

Under what is sometimes called the Clayton Finality Act, adopted in 1959, 15 U.S.C. § 21, the Commission's order, when it becomes final, subjects respondents to a

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[17] Meyer attacks various isolated phrases of this order as well, but an examination of the language to which it objects reveals that such language, though included in the Hearing Examiner's proposed order, was not included in the Commission's final order quoted above.

$5,000 penalty for each violation, and, where the violation is continuing, to $5,000 per day penalty while it continues. This, we think, requires that Commission orders be more carefully framed than formerly, and that they no longer be a mere command to obey the statute. This, we think, is the effect of Mr. Justice Brennan's caveat in *FTC* v. *Henry Broch & Co.*, 1962, 368 U.S. 360, at 367-68. There he said:

> "We do not wish to be understood, however, as holding that the generalized language of paragraph (2) would necessarily withstand scrutiny under the 1959 amendments. The severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application."

In *Swanee Paper Corp.* v. *FTC*, 2 Cir., 1961, 291 F.2d 833, 837-38, *cert. denied*, 1962, 368 U.S. 987, a § 2(d) case, the court said:

> "Administrative agencies have wide discretion in framing their orders and are empowered to enjoin other related unlawful acts which may occur in the future . . . but there must be some relation between the facts found and the breadth of the order . . . . [fol. 185] Moreover, the order is not even limited to related activities but enjoins Swanee from violating Section 2(d) in the very words of the statute . . . . Moreover, the order as written is so broad that, under the new enforcement provisions of the Clayton Act (15 U.S.C.A. § 21), the duty of enforcing the prohibitions of Section 2(d) as to Swanee is shifted from the Commission to the federal courts, which may in the future be forced to decide the very issues that Congress has entrusted the Commission to determine . . . . [W]e therefore hold that the order should be limited to the particular practice found to violate the statute."

The court directed, under its rule 13(l), that the Commission prepare an order in conformity with the court's

opinion. A similar result was reached in *Grand Union Co.* v. *FTC*, 2 Cir., 1962, 300 F.2d 92, 101-2, a § 5 case involving, as this one does, violation of § 2(d), and for similar reasons. To the same effect is *American News Co.* v. *FTC*, 2 Cir., 1962, 300 F.2d 104, 111, also a § 5-§ 2(d) case. See also *Joseph A. Kaplan & Sons, Inc.* v. *FTC*, D.C. Cir., 1965, 347 F.2d 785, 788-91.

We think that the order here is subject to many of the strictures levelled by the courts at the orders involved in the foregoing cases. We reject, however, the contention that the order should be restricted to the specific products involved in the violations proved, or to any specific product. The scheme involved is much broader, and an order can properly be directed against such a scheme or comparable ones. We think that the order goes much beyond that and should be so limited. The 2(a)-2(f) order also seems, on its face, to exclude the normal defenses to a section 2(a) violation charge. This, we think, is improper. The section 5 order covers "processing, handling," not here involved. The language in that order: "including other customers who resell to purchasers who compete with respondent in the resale of such suppliers' products" must be stricken. The order is also overly broad as to the two individuals; it should be limited to activities related to the business of Fred Meyer, Inc.

The Commission knows how to draw narrower orders. (See *The Quaker Oats Co.*, CCH Trade Reg. Rep. 1961-63 Transfer Binder, ¶ 15,858; *Vanity Fair Paper Mills, Inc.*, CCH Trade Reg. Rep., 1961-63 Transfer Binder, ¶ 15,796; [fol. 186] *Transogram Co.*, CCH Trade Reg. Rep., 1961-63 Transfer Binder, ¶ 16,080; *All-Luminum Prods., Inc.*, 3 CCH Trade Reg. Rep. ¶ 16,665.) It is the expert body. We leave to it the preparation of an order consistent with this opinion.

The order, when properly modified, will be enforced. The Commission shall prepare a proposed decree, conforming to this opinion, pursuant to our Rule 34, subparagraph 12.

[fol. 187]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[File Endorsement Omitted]

No. 18,903

FRED MEYER, INC., a corporation, and FRED G. MEYER and EARLE A. CHILES, individually and as officers of said corporation, PETITIONERS

vs.

FEDERAL TRADE COMMISSION, RESPONDENT

FINAL DECREE—July 1, 1966

Petitioners herein having filed in this Court on September 17, 1963, a petition to review and set aside an order to cease and desist issued against them on July 9, 1963, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of Fred Meyer, Inc., a corporation, and Fred G. Meyer and Earle A. Chiles, individually and as officers of said corporation, Docket No. 7492," and the matter having been heard by this Court on the record and briefs on June 9, 1965, and this Court having rendered its decision on March 18, 1966,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the aforesaid order to cease and desist be, and it hereby is, modified to read as follows:

[fol. 188] IT IS ORDERED that respondent Fred Meyer, Inc., a corporation, its officers, agents, representatives and employees, and Fred G. Meyer and Earle A. Chiles, individually and as officers of and in connection with activities related to the business of respondent Fred Meyer, Inc., in connection with the offering to purchase or purchase by or on behalf of respondent Fred Meyer, Inc., in commerce, as "commerce" is defined in the amended Clayton Act, of

products for resale in outlets operated by respondent Fred Meyer, Inc., do forthwith cease and desist from:

Knowingly inducing, or knowingly receiving or accepting, in connection with any promotional scheme consisting of distribution of coupons to and return of coupons by consumers in connection with the purchase by consumers of products offered for resale in retail outlets of respondent Fred Meyer, Inc., or in connection with any comparable scheme, any discrimination in the price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price respondents know or should know is:

(a) below the net price at which such products of like grade and quality are being sold by such seller to any other purchaser with whom respondent Fred Meyer, Inc., competes, or with whose customer or customers said respondent competes and

(b) not a price differential which makes only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which products are sold and delivered by such seller and

(c) not a price change in response to changing conditions affecting the market for or marketability of such products, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned and

[fol. 189] (d) not a price made in good faith to meet an equally low price of a competitor of the seller.

For the purpose of determining "net price" under the terms of this order, there shall be taken into

account all discounts, rebates, allowances, deductions, or other terms and conditions of sale by which net prices are effected.

IT IS FURTHER ORDERED that respondent Fred Meyer, Inc., a corporation, its officers, agents, representatives and employees, and Fred G. Meyer and Earle A. Chiles, individually and as officers of and in connection with activities related to the business of respondent Fred Meyer, Inc., directly or through any corporate or other device in or in connection with any purchase by or on behalf of respondent Fred Meyer, Inc., in commerce, as "commerce" is defined in the Federal Trade Commission Act, of products for resale in outlets operated by respondent Fred Meyer, Inc., do forthwith cease and desist from:

Inducing or receiving anything of any value from any supplier as compensation for or in consideration of advertising, promotion, or display services or facilities furnished by or through Fred Meyer, Inc., in connection with any promotional scheme consisting of distribution of coupons to and return of coupons by consumers in connection with the purchase by consumers of products offered for resale in retail outlets of respondent Fred Meyer, Inc., or in connection with any comparable program, or in connection with any actual or purported promotion or special sale of particular products to be conducted by or on behalf of respondent Fred Meyer, Inc., when respondents know or should know that such compensation or consideration is not being offered or otherwise made available by such supplier on proportionally equal terms to all of its other customers competing with respondent Fred Meyer, Inc., in the sale of such supplier's products.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the aforesaid order to cease and desist as so modified be, and it hereby is, affirmed, and that peti-

[fol. 190] tioners be, and they hereby are, ordered to obey and comply with said order as so modified.

/s/ Albert H. Jertberg

/s/ Ben C. Duniway
United States Circuit Judges

/s/ Roy Foley
United States District Judge

[fol. 191]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 192]

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1966

FEDERAL TRADE COMMISSION, PETITIONER

vs.

FRED MEYER, INC., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—September 30, 1966

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Oct. 21, 1966.

/s/ Wm. O. Douglas
Associate Justice of the Supreme Court of the United States

Dated this 30th
day of September, 1966.

[fol. 193]

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1966

FEDERAL TRADE COMMISSION, PETITIONER

vs.

FRED MEYER, INC., ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—October 24, 1966

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including Nov. 21, 1966.

/s/ Wm. O. Douglas
Associate Justice of the Supreme Court of the United States

Dated this 24th
day of October, 1966.

[fol. 194]

SUPREME COURT OF THE UNITED STATES

No. 789, October Term, 1966

FEDERAL TRADE COMMISSION, PETITIONER

v.

FRED MEYER, INC., ET AL.

ORDER ALLOWING CERTIORARI—February 13, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, limited to Question 1 presented by the petition which reads as follows:

"1. Whether a supplier's granting to a retailer who buys directly from it promotional allowances that are not made available to a wholesaler who resells to retailers competing with the direct-buying retailer violates Section 2(d) of the Robinson-Patman Act."

The case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1967 249481 706

SUPREME COURT, U. S.
NOV 21 1966
JOHN F. DAVIS, CLERK

No. 789-37

In the Supreme Court of the United States

OCTOBER TERM, 1966

FEDERAL TRADE COMMISSION, PETITIONER

v.

FRED MEYER, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No.

FEDERAL TRADE COMMISSION, PETITIONER

v.

FRED MEYER, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on July 1, 1966.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–26a) is reported at 359 F. 2d 351. The opinion of the Federal Trade Commission (R. 59–142)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1966 (App. B, *infra*, 27a–30a). By orders

[1] "R." refers to the two-volume Transcript of Record in the court of appeals.

of Mr. Justice Douglas of September 30, 1966 and October 24, 1966, the time for filing a petition for a writ of certiorari has been extended to and including November 21, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a supplier's granting to a retailer who buys directly from it promotional allowances that are not made available to a wholesaler who resells to retailers competing with the direct-buying retailer violates Section 2(d) of the Robinson-Patman Act.

2. Whether the court of appeals improperly modified the Commission's order by inserting in the portion of the order prohibiting the inducement or receipt of discriminatorily lower prices a specific recital of the statutory defenses to a charge of price discrimination.

The Commission asks the Court to review the second question only if it grants review of the second question presented in the petition for certiorari filed by respondents in No. 703, this Term. See *infra*, pp. 14–15.

STATUTES INVOLVED

Section 2 of the Clayton Act, as amended, 49 Stat. 1526, 15 U.S.C. 13, provides in pertinent part as follows:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality * * *

where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *.

* * * * *

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

* * * * *

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Section 5(a) of the Federal Trade Commission Act, as amended by 66 Stat. 632, 15 U.S.C. 45(a), provides in part as follows:

> (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> (6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

After extensive proceedings, the Federal Trade Commission found that respondent Fred Meyer, Inc., and two of its officers (1) violated Section 2(f) of the Clayton Act by knowingly inducing certain suppliers of Meyer to grant it discriminatory prices illegal under Section 2(a) of the Act, and (2) violated Section 5 of the Federal Trade Commission Act by knowingly inducing certain suppliers to grant Meyer promotional allowances illegal under Section 2(d) of the Clayton Act; and entered a cease-and-desist order.

Meyer (hereinafter "respondent") operates a chain of thirteen retail stores in the Portland, Oregon, area selling groceries, drugs, variety items, and a limited line of clothing. With sales exceeding $40 million in 1957, it was, during the relevant period, the second largest seller of all goods in the area (App. A, 1a; R. 60).

Since 1936, respondent has conducted, through the use of coupon books, a promotional advertising cam-

paign for one month of each year. For each promotion, it prints and distributes a 72-page book, each page of which features a single product and serves as a coupon for the purchase of certain amounts of such products at a specially reduced rate. The campaign involves a large promotion: about 140,000 books were used in 1957, and about 120,000 in 1958 (App. A, 2a; R. 62–64). Respondent finances the promotion by charging the supplier of each featured product a basic fee of $350. In addition, some of these suppliers give respondent price reductions based upon volume purchases, replace without charge goods that respondent has sold at special prices, or redeem coupons at an agreed rate (App. A, 2a; R. 64–67).

The evidence considered in the Commission proceedings related to transactions between the respondent and five of its suppliers, only four of which participated in the coupon-book program. The Commission found that the first $350 paid to respondent by each of four participating suppliers was a promotional allowance within the meaning of Section 2(d), and that the additional benefits granted by these suppliers [2] in connection with the program were price concessions within the purview of Section 2(a). It found that both Sections 2(d) and 2(a) had been violated since these suppliers had not granted the same

[2] In a subsequent, separate proceeding against one of these suppliers, the Commission found no injury to competition—a requisite for a Section 2(a) violation. It therefore did not rely in the court of appeals on the transactions between that supplier and respondent as part of its case relating to the price-discrimination charge against respondent. See App. A, 6a, n. 5.

promotional allowances and price concessions to other buyers of the same products who resold them in the Portland area; and that Section 2(d) had also been violated by a fifth supplier's granting respondent promotional allowances, not connected with the coupon-book program, which were not available to two other buyers reselling in the same area (App. A, 4a–11a; R. 61–76).

Some of the buyers disfavored by the suppliers were wholesalers who resold to retailers competing with respondent. The Commission ruled that these disfavored wholesalers were protected under Section 2(d) from discriminatory promotional allowances in favor of respondent even though respondent was not a wholesaler but a direct-buying retailer (R. 85–93). The Commission further found that respondent and its officers knew or had reason to know that the promotional allowances (Section 2(d)) and price concessions (Section 2(a)) given by the suppliers were discriminatory (App. A, 14a–21a; R. 103–136), and concluded that they had therefore violated Sections 5 and 2(f). The Commission's order specified that respondent could receive only those price concessions and promotional allowances granted wholesalers reselling to respondent's retail competitors[3] (App. A, 23a).

[3] The order consisted of two parts. One part enjoined violations of Section 2(f) of the Robinson-Patman Act, and the other part enjoined violations of Section 5 of the Federal Trade Commission Act. The Section 2(f) part of the order enjoined respondent and its officers from inducing price discriminations between respondent and other customers of the same supplier where respondent is "competing with the purchaser

The Court of Appeals for the Ninth Circuit upheld the Commission's findings that respondent had induced (1) price concessions which were illegal because they discriminated against certain other retail buyers and certain wholesale buyers, and (2) promotional allowances which were illegal because they were not made available to competing retail buyers. The court, however, reversed the Commission's ruling that respondent acted illegally in inducing promotional allowances that were not made available to wholesale buyers who sell to retailers with whom respondent competes. The court followed its prior decision in *Tri-Valley Packing Assn.* v. *Federal Trade Commission*, 329 F. 2d 694, 709, in which it had held that Section 2(d) does not apply if the favored and the disfavored buyers compete on different "functional levels," *e.g.*, if one is a wholesaler and the other a retailer.[4] The court also modified the Commission's

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paying the higher price or with a customer of the purchaser paying the higher price" (App. A, 23a). The Section 5 part enjoined respondent and its officers from inducing any promotional allowance not offered to other customers of the same supplier "competing with respondents in the sale and distribution of such supplier's products, including other customers who resell to purchasers who compete with respondents in the resale of such supplier's products" (App. A, 23a).

[4] In *Tri-Valley* the court had relied upon a prior Commission decision, *Atalanta Trading Corp.*, 53 F.T.C. 565 (1956), reversed on other grounds, *Atalanta Trading Corp.* v. *Federal Trade Commission*, 258 F. 2d 365 (C.A. 2), that Section 2(d) applied only if there was competition at the same functional level. The Commission took the same position in *Liggett & Myers Tobacco Co., Inc.*, 56 F.T.C. 221, 250–253 (1959). The Commission in the present case acknowledged that it was overruling *Liggett & Myers* (R. 93).

order in certain respects (App. A, *infra*, 22a–26a; compare R. 56–58, 157, and App. B, *infra*, 27a–30a; see *infra*, pp. 14–15).

REASONS FOR GRANTING THE WRIT

1. Section 2(d) of the Robinson-Patman Act prohibits suppliers from giving promotional allowances to customers who distribute their products unless the allowances are made "available on proportionally equal terms to all other customers competing in the distribution of such products." In reversing in part the Commission's holding that respondent had violated Section 5 of the Federal Trade Commission Act by inducing promotional allowances from suppliers that were illegal under Section 2(d), the court of appeals held that the prohibition of the latter section does not extend to a supplier who gives to a retailer buying directly from it promotional allowances not made available to wholesalers who sell to other retailers directly competing with the favored retailer, on the ground that the disfavored wholesalers were not "customers competing in the distribution" of the supplier's goods. This ruling, we submit, is erroneous and, if allowed to stand, would create a serious loophole in the congressional design in the Robinson-Patman Act "to curb and prohibit all devices by which larger buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, 168.

(a) Read in the light of the congressional purpose to protect small buyers against the "discriminatory

preferences" which large buyers can obtain "by virtue of their greater purchasing power" (*Broch, supra*), the Commission's interpretation of Section (2)(d) was correct. That section prohibits discriminatory allowances not made available to all other "customers competing in the distribution" of the discriminating seller's products. The suppliers in this case used two different channels by which they distributed their products to retailers. In the case of respondent, a large buyer, they sold directly. In other instances they sold initially to wholesalers who, in turn, resold to other, and presumably frequently smaller, retailers. Respondent competed with the retailers who purchased through the wholesalers (R. 94–95), and any allowance given to respondent that was not made available to the wholesalers necessarily would subject the other retailers to competitive injury. As the Commission noted, "And if the wholesaler is denied promotional allowances received by respondents, it obviously cannot pass them on to its retailer-customers or use them for the benefit of those customers" (R. 89–90).

Giving the words of the statute their reasonable meaning in the light of the legislative purpose, the wholesalers are "customers competing in the distribution" of the suppliers' products. They admittedly are "customers," and they are "competing in the distribution" of the suppliers' products because, by serving as a necessary nexus between the suppliers and the retailers, they are the conduit through which the sup-

pliers distribute their products. As the Commission explained (R. 89):

> * * * It is true, of course, that only the retailer-customers of these two wholesalers compete with respondents in the direct resale of the goods to consumers. But the statute speaks of competition in the "distribution" of the products, not merely of competition in their "resale." These wholesalers, through their numerous retailer-customers, are seeking exactly the same consumer dollars that respondents are after. Every time an independent retailer loses a sale to respondents, the wholesaler who supplied that independent retailer suffers a loss of volume by just that much. And if all of the independent retailers in Portland should close their doors, these wholesalers would necessarily be finished in that market.

In other words, in the circumstances of this case the wholesalers and their retailers form a network of distribution that competes with direct-buying retailers. The fact that the direct-buying retailer chooses not to buy through wholesalers does not remove it from competition with both the wholesaling and the retailing portions of the competing product distribution network.

The court of appeals' narrowly literal reading of Section 2(d)—that it does not cover such discriminatory promotional allowances because the wholesalers and the favored retailer-respondent are not "competing" with each other in the sense that they directly serve the same customers—not only disregards the important public policy goal that this remedial statute

was intended to serve, but creates a serious anomaly within the statute itself.

This Court long ago established that the Robinson-Patman Act prohibits price discrimination in favor of a direct-buying retailer against a wholesaler who resells to retailers competing with the direct-buying retailer, regardless of the different functional levels on which they might be viewed as competing. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 55. Promotional allowances, of course, are but an indirect form of price discrimination, and Congress hardly could have intended to sanction the very type of discrimination that it prohibited as a price concession under Section 2(a) when accomplished as a promotional allowance under Section 2(d). Rather, Congress intended Section 2(d) to prevent the circumvention of the general prohibition of Section 2(a) by the use of promotional allowances instead of outright price concessions. *Krug* v. *International Telephone and Telegraph Corp.*, 142 F. Supp. 230, 236 (D. N.J.). Rowe, *Price Discrimination under the Robinson-Patman Act*, 365 (1962). See *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 68.[5]

In the light of these considerations, the difference in language between Sections 2(a) and 2(d)—the former forbids price discrimination whose effect is to lessen

[5] Compare *Biddle Purchasing Co.* v. *Federal Trade Commission*, 96 F. 2d 687 (C.A. 2), certiorari denied, 305 U.S. 634, in which the court held that Section 2(c) of the Act (dealing with brokerage fees) was designed to prevent the circumvention of the prohibition of Section 2(a) by the use of discriminatory brokerage fees instead of outright price concessions.

competition with the person granting or receiving the discrimination "or with customers of either of them," and the latter prohibits promotional allowances not available to "customers competing in the distribution" of the seller's product—does not justify the much narrower scope which the court of appeals' decision gives to Section 2(d).[6]

The court of appeals' interpretation of Section 2(d) creates the further anomaly that it would forbid discrimination between two large direct-buying retailers but would allow discrimination between large direct-buying retailers and small retailers who buy through wholesalers. Such small retailers, however, most need the protection of the Robinson-Patman Act and were intended by Congress to have it. As the

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[6] As the Commission noted, while Section 2(a), unlike Section 2(d), "specifically describes the several levels of 'competition' to be protected (competition with the giver and the receiver of the lower price, 'or with customers of either of them'), that description sets forth not the elements of a price discrimination—which 'is merely a price difference', Federal Trade Commission v. Anheuser-Busch, Inc., 363 U.S. 536, 549 (1960)—but the 'effects' that must appear before the 'discrimination' will be deemed harmful enough to warrant the laying on of the laws [sic] restraining hand. Hence that language, although it supported the Court's conclusion in Morton Salt, supra, that the 'difference' between the price charged the favored retailer and the nonfavored wholesalers amounted to a price 'discrimination', was not essential to it. The same result would doubtless have been reached if the draftsmen of Section 2(a), while retaining its present description of the offense of 'discrimination', i.e., 'discriminate in price between different purchasers', had made it a per se provision like Section 2(d) and thus omitted completely all reference to the three levels of competition at which injury can occur" (R. 90–91).

Commission explained in rejecting the construction adopted by the court below (R. 87):

> * * * [I]n a geographical market served by, say, two direct-buying "chains," and one wholesaler with 100 retailer-customers, a supplier who gave a promotional allowance to Chain A would not be required by Section 2(d) to give it to either the wholesaler or the 100 independent retailers who buy from it, but would have to give it to Chain B. This would mean, of course, that the protection of Section 2(d) is accorded to those who presumably have the market power to take care of themselves (competing "chains"), but denied to those who, as the instant record clearly shows, need its protection very badly indeed.

(b) The question is an important and continuing one in the administration of the Robinson-Patman Act which this Court should resolve, even though no conflict among circuits exists. Since review of Commission orders under the Clayton Act and the Federal Trade Commission Act may be had in any circuit in which the company "resides or carries on business" (15 U.S.C. 21(c), 45(c)), any firm that does business on the West Coast—and most major American firms plainly do—can channel any review proceedings of further Commission orders involving this question into the Ninth Circuit. Indeed, the Commission recently reaffirmed its position on this issue in *Clairol, Incorporated* (Federal Trade Commission Docket No. 8647, decided June 24, 1966), and a petition to review its order in that case has been

filed in the Ninth Circuit (No. 21235). Thus, the likelihood of a conflict developing on this important issue seems remote; as long as the decision of the court of appeals stands, however, it is bound to have an important, and we believe seriously adverse, impact upon the administration of the Act.

2. The court of appeals made one modification in the Commission's order that the Commission considers erroneous. We do not believe, however, that the correctness of this modification, standing alone, presents an issue warranting review by this Court. In their petition in No. 703, this Term, however, respondents, in addition to challenging certain aspects of the merits of the Commission's decision, also attack the modified order as unduly broad. Although we intend to oppose the petition in No. 703, we submit that, if the Court should grant that petition with respect to the scope of the order (the second question presented), it should also review the modification here mentioned.

The court of appeals inserted in the portion of the Commission's order prohibiting the receipt of illegal price concessions a specific reference to the various statutory defenses to a charge of granting such concessions. Thus, for example, the court's order bars respondents from knowingly receiving or inducing any discriminatory price they "know or should know is * * * (d) not a price made in good faith to meet an equally low price of a competitor of the seller" (App. B, *infra,* 28a–29a). To the extent that this modification merely reflects the court's wish to make explicit what is implicit in every such order (*Federal*

Trade Commission v. *Ruberoid,* 343 U.S. 470, 476) (App. A, *infra,* 25a), it is superfluous. On the other hand, the modification could be read as imposing upon the Commission, in a penalty proceeding for alleged violations of the order, the burden of proving not only that respondents received illegal price concessions but also that they knew or should have known that the statutory defenses were not available to the seller. The Commission does not believe that, in an enforcement proceeding relating to the receipt of illegal concessions, it is required to assume the latter burden. In any event, this provision of the order as thus modified is sufficiently ambiguous so that it is likely to create problems in future enforcement proceedings.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be granted.

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NOVEMBER 1966.

238-344 O—66——3

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FRED MEYER, INC., et al., *Petitioner,* vs. FEDERAL TRADE COMMISSION, *Respondent.*	No. 18,903

[March 18, 1966]

Petition to Review an Order of the Federal Trade Commission

Before: JERTBERG and DUNIWAY, Circuit Judges, and FOLEY, JR., District Judge

DUNIWAY, Circuit Judge:

This is a petition to review and set aside an order of the Federal Trade Commission which directs that petitioners, Fred Meyer, Inc. and two of its officers, all of whom we refer to as Meyer, cease and desist from conduct in alleged violation of section 2(f) of the Clayton Act, 15 U.S.C. § 13(f), and section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

These, as found by the Commission, are the facts. Fred Meyer, Inc., an Oregon corporation, operates a chain of thirteen retail supermarkets in Portland, Oregon, and the immediate vicinity, in which it sells grocery products, drugs, variety items, and a limited line of clothing. Its sales in 1957 exceeded $40 million, making it, during the relevant period, the second largest seller of all goods in the area. In 1960 it made one-fourth of all retail food sales in the Portland area, by its own claim selling to "75% of Oregon's population" through its supermarkets located "in every neighborhood."

In about 1936 petitioner commenced an annual promotion, called the "coupon book promotion," beginning in September and ending four weeks later. The mechanics of the coupon book are simple. Meyer prints a book, usually containing 72 pages, each page of which features a single product. These pages are the "coupons" and each entitles the customer to the specially reduced price there stated. The customer buys the book for the nominal sum of ten cents and must surrender the appropriate coupon when making his purchase of goods. It is a successful promotion: Meyer sold 138,700 books in 1957 and 121,270 in 1958.

The cost of the books and related advertising expenditures[1] was met only in part by revenue from their sale; the rest was supplied, in amounts approximating *total* costs, by participating suppliers who usually paid, at the very least, a flat rate of $350 per coupon page. These payments were made sometimes in cash, sometimes in price discounts on goods purchased for resale during the promotion, and sometimes by replacement of a predetermined portion of the goods so sold. Some of the suppliers further underwrote the promotion by granting volume-based reductions, replacing goods sold, or redeeming coupons in cash at an agreed rate. Certain of these, as well as other unrelated promotional payments which constitute part of the subject matter of the complaint, are detailed in Part I of this opinion.

As a consequence of the solicitation and receipt of these payments, the Commission issued a two-count complaint against petitioners. Count I, based on the coupon book promotion, charged a violation of section 2(f) of the Clayton Act by inducing and receiving "discriminatory prices, discounts, allowances, rebates and terms and conditions of sale" which they knew or should have known were granted in violation of section 2(a) of that Act. Count II charged a violation of section 5 of the Federal Trade Commission Act by the inducement of promotional aid, of the type forbidden by section 2(d) of the Clayton Act, with reference

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[1]Total promotional expenditures of this type amounted to $23,406, or about 17 cents per book, in 1957, and not dissimilar amounts in the other years involved.

to both the coupon book promotion and other, unrelated promotions. These statutes are set out in pertinent part in the margin.[2]

The Hearing Examiner's decision found the violations as charged. The Commission affirmed and issued the cease and desist order which, exceptions to it having been rejected, is now here for review.

Meyer raises six basic questions here, and levels a broadside attack on the sufficiency of the evidence to sustain the Commission's findings. Those questions are (1) whether the supplier payments here are cognizable at all under section 2(a), (2) whether section 2(d) requires suppliers to refrain from discriminating among customers who occupy different functional levels or varying combinations of functional levels, (3) whether Meyer knew or

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[2]Clayton Act § 2, as amended by Robinson-Patman Act, 15 U.S.C. § 13:

"(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered:"

"(d) It shall be unlawful for any person . . . to pay or contract for the payment of anything of value to or for the benefit of a customer of such person . . . as compensation or on consideration for any services or facilities furnished by or through such customer in connection with the . . . sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

"(f) It shall be unlawful for any person . . . knowingly to induce or receive a discrimination in price which is prohibited by this section."

(References to "commerce" omitted)

Federal Trade Commission Act § 5, 15 U.S.C. § 45:

"(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful . . . ."

had reason to know of the unlawfulness of the payments it induced, (4) whether inducement of disproportionate promotional payments is cognizable under section 5 of the Federal Trade Commission Act, and (5) whether the Commission's cease and desist order was improperly directed to the corporation's officers as individuals, or (6) was improper for failure to reasonably relate to the practices found to be unlawful.

I. THE EVIDENCE.

Complaint counsel chose transactions with five suppliers—Burlington Industries, Inc., Cannon Mills Company, Tri-Valley Packing Association, Idaho Canning Company, and Phillip Morris, Inc.—during 1956, 1957, and 1958, to ground the complaint. Meyer asserts, with respect to each supplier, that the proof is vitally insufficient to support the findings. We examine the transactions seriatim, stating the facts as the Commission found them.

A. *Burlington Industries, Inc.*

Burlington participated in the 1957 and 1958 coupon book promotions, agreeing in the spring of each year to reduce its prices to Meyer by, respectively, 50-94 cents and 75 cents per dozen pairs of nylon hose. The disfavored customer, Lipman, Wolfe & Co., a Portland retail department store, received no discount on its contemporaneous purchases.

Meyer argues first that since these purchases were arranged at times separated by substantial intervals, though completed by contemporaneous purchase orders and deliveries, there cannot be that comparability which the statute demands as a basis for a finding of discrimination and injury to competition. The Commission responds that the Act contemplates competition in distribution, which it found to exist, and that the time of purchase by different customers is only evidence bearing on the existence of that competition. Its contention finds support in *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 5 Cir., 1962, 307 F.2d 916, 921. A substantial time interval indicates only that different prices might have been caused by different market conditions, rather than by an accomplished intent to discriminate. Here the record indicates that market conditions had not changed ma-

terially.[3] Such a determination is more properly for the Commission than for the courts. See *Universal Camera Corp. v. NLRB*, 1951, 340 U.S. 474, 488; *Carter Prods., Inc. v. FTC*, 9 Cir., 1959, 268 F.2d 461, 492, *cert. denied*, 1959, 361 U.S. 884. We cannot say that the determination here is not supported by substantial evidence; it is, therefore, conclusive, 15 U.S.C. §§ 21(c), 45(c); see *Universal Camera, supra; cf.* 5 U.S.C. 1009(e) [Administrative Procedure Act § 10(e)(B)(5).] *Atalanta Trading Corp. v. FTC*, 2 Cir., 1958, 258 F.2d 365, cited by Meyer, is not contrary. There isolated and non-recurring sales of particular products had been made, without allowances, to competitors of the allegedly favored customer several months before and after the sales to the favored customer. The court, contrary to the Commission's construction of the law, held that these facts standing alone could not establish a prima facie case of discrimination because such a rule would force a supplier to elect to give promotional allowances at the time of the first sale of a product or not at all, a result which would "stifle rather than encourage competition and have the practical effect of outlawing all promotional allowances." *Id.* at 371. But here the sales are of a single, fairly standardized item, widely sold in the area, and recur frequently during the years involved. Hence *Atalanta* is not controlling.

Meyer next contends that the evidence fails to show that the hosiery purchased by it and by Lipman, Wolfe was of "like grade and quality," (15 U.S.C. § 13(a), *Atalanta Trading Corp. v. FTC*, 2 Cir., 1958, 258 F.2d 365, 369-70) asserting that the fact that it had entered additional specifications on its purchase orders compels the conclusion that a different grade and quality resulted. However, the record fails to show that these changes, if in fact made, produced any difference in the marketability, appearance, durability, cost or manner of manufacture, or other indicia of "grade and quality" of the goods. Moreover, in Burlington's invoices to both customers the hose are identified by identical style numbers. This, we think, is sufficient to permit the inference that the goods themselves were identical. *Cf. Central Paper Co. v. Southwick*, 6 Cir., 1932, 56 F.2d 593, 597-98; *Straus v. Victor*

[3]The Commission has, in fact, found sales to two competitors three and a half months apart sufficiently comparable on "a showing of continuous sales of regularly promoted items," *Joseph A. Kaplan & Sons, Inc.*, 1963, FTC Dkt. 7813, CCH Trade Reg. Rep. ¶16,666.

Talking Machine Co., 2 Cir., 1924, 297 Fed. 791, 804-05; see also *United States v. Bryan*, 1950, 339 U.S. 323, 332. That each customer specified and received private label packaging does not, without more—and "more" is lacking here—change that conclusion. See *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 5 Cir., 1962, 307 F.2d 916, 923.[4]

Finally, Meyer makes much of the disparity in quantities purchased by it and by Lipman, Wolfe & Co., asserting that by reason of such disparity a presumption of cost justification arises which complaint counsel should but failed to rebut. Such arguments are properly addressed to the proposition that Meyer had no knowledge or reason to know that the allowances it received were discriminatory, and so we relegate consideration of them to that portion of this opinion.

B. *Cannon Mills Company.*

Cannon Mills is said to have violated sections 2(a)[5] and 2(d) of the Act by granting, at Meyer's instance, a 10 cents per dozen allowance on fingertip towels sold during the 1956 promotion. These towels, regularly sold at retail for 23 cents each, were advertised for sale at 7 for $1.00. Meyer purchased 2,000 dozen in March and another 5,500 dozen in October of 1956, while Roberts Brothers, the Portland retail department store allegedly discriminated against, purchased a total of 600 dozen (bearing the same style number as those purchased by Meyer) in April, June, and November of that year.

Meyer again claims that identity of style numbers on billing invoices is insufficient proof of likeness of grade and quality. For

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[4]The Commission has long held that brand differences alone do not necessarily compel the conclusion that the products are not of "like grade and quality" and that brand identity may overcome insignificant physical differences in the goods or their containers, see Rowe, Price Discrimination Under the Robinson-Patman Act 69-73 (1962, Supp. 1964) and cases cited there.

[5]A subsequent proceeding against Cannon Mills, *Cannon Mills Co.*, FTC Dkt. 7494, 3 CCH Trade Reg. Rep. ¶16,878 (1964), resulted in dismissal of the complaint because competitive injury had not been shown. The Commission therefore here refrains from relying on these alleged violations insofar as the section 2(a) charge is concerned.

the reasons already set out, we disagree. The Commission was justified in concluding that the towels were identical.

A somewhat more substantial question is raised by the claim that the record fails to show simultaniety of stocking, handling, or resale of the towels, hence the required competition has not been proved. But again we think that the Commission, more expert than we in the mechanics of retail merchandising, could and did reasonably conclude that such competition existed. A knowledgeable witness, in fact, so testified, and we have previously held substantially identical evidence sufficient to uphold a similar finding, *Tri-Valley Packing Ass'n v. FTC*, 9 Cir., 1964, 329 F.2d 694, 701.

C. *Tri-Valley Packing Association.*[6]

The Commission's case here is that Meyer purchased, for the 1957 coupon book promotion, 2,200 cases of its private label "My-Te-Fine" fancy grade sliced and halved peaches from Tri-Valley, concededly at the same time that Hudson House, a disfavored wholesaler, purchased 175 cases of identically described merchandise under its own private label from the same source. Tri-Valley agreed to pay Meyer $350 (in merchandise or cash, at its option) for a coupon page and to redeem, in merchandise, every third can sold on the coupon's "Buy two cans and get one free" offer. No such offer was made or made available on proportionally equal terms to Hudson House.

Meyer again founds its attack on the proposition that "like grade and quality" were not sufficiently proved, pointing to evidence in the record tending to show that the quality of peaches sold under the general classification of "fancy" varies according to where, when, and by whom the peaches were grown and packed.

But a Portland retailer witness specifically testified that he competed directly, in peaches of the grade and quality purchased from Hudson House, with a nearby Meyer store. And the fact that the goods were identically described on the supplier's invoices to Meyer and to Hudson House sufficiently establishes commercial

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[6]We have previously considered Tri-Valley's participation in Meyer's 1957 coupon book promotion, see *Tri-Valley Packing Ass'n v. FTC*, 9 Cir., 1964, 329 F.2d 694, 707-10.

identity or commercial fungibility, which is all that the Robinson-Patman Act demands.[7] To require the level of proof for which Meyer contends would be to require the impossible.

Meyer further argues that the proof is insufficient because it is not shown that these Tri-Valley peaches made their way to customers of Hudson House. We agree. *Tri-Valley Packing Ass'n, supra,* at 708-11, made it clear that competition at the same functional level must be shown. Here, Meyer, an integrated operation, and Hudson House, a wholesaler, do not compete at the same functional level, hence Tri-Valley goods must be directly traced to Hudson's customers to show that Tri-Valley has dealt "directly" with them, that they are "indirect customers" of Tri-Valley and therefore in competition with Meyer in the sale of comparable goods. *Ibid.*[8] That has not been shown. In consequence, the proof must be held insufficient as to a 2(d)-2(f) charge involving Tri-Valley. Whether it is insufficient support for a 2(a)-2(f) charge or for a Federal Trade Commission Act § 5 charge is considered later in this opinion.

D. *Idaho Canning Company.*

Meyer does not, as it cannot, dispute the sufficiency of proof of simultaniety of sale and comparability of grade and quality of canned corn sold to Meyer and to Hudson House and Wadhams & Co., the nonfavored wholesaler purchasers. Idaho Canning's participation in Meyer's 1957 coupon book promotion consisted of payment in merchandise of $350 for a coupon book page and redemption in free goods of coupons received by Meyer offering one free can of corn for every two purchased, a transaction substantially identical with that of Tri-Valley. Idaho's participation

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[7] *Cf. Bruce's Juices, Inc., v. American Can Co.,* S.D. Fla., 1949, 87 F. Supp. 985, 987, *aff'd,* 5 Cir., 1951, 187 F.2d 919, 924. See also *Moog Indus., Inc. v. FTC,* 8 Cir., 1956, 238 F.2d 43, 49-50, *aff'd,* 1958, 355 U.S. 411.

"The 'like grade and quality' concept . . . was designed to serve as one of the necessary rough guides for separating out those commercial transactions insufficiently comparable for price regulation by the statute." Report of the Attorney General's National Committee to Study the Antitrust Laws 157-58 (1955).

[8] See Rowe, Price Discrimination Under the Robinson-Patman Act, § 13.11 at p. 398-99 (1962, Supp. 1964) and cases there cited.

was solicited by Meyer, and it made no comparable offer to Hudson House or Wadhams & Co.

Equally here, the proof is vitally insufficient to support a 2(d)-2(f) charge in that the goods were traced only to the wholesaler. Robinson-Patman doctrine has not yet progressed to a point which allows the Commission to infer an "indirect customer" relationship from the mere fact that goods were supplied to a middleman, at least where those goods became inextricably mixed with other, identical goods purchased from other suppliers before their resale to retailers. No more than that has been proved here.

E. *Phillip Morris, Inc.*

The complaint charges violations involving Phillip Morris of § 2(d) and of § 5 of the Federal Trade Commission Act, but not of § 2(a). These alleged violations were the solicitation and receipt by Meyer of (1) a $500 payment for participation in Meyer's 1956 "Gift Days" promotion; (2) a $400 payment on April 26, 1957 in connection with Meyer's 1957 "Thrift Days" promotion; (3) a payment of $800 (received on October 24, 1956) for Meyer's promotion of Parliament cigarettes during September, 1956; and (4) payment of $150 per month during most of 1956 for promotion of Phillip Morris tobacco products. Meyer does not contend that the payments were not made. It does say, however, that mere proof of payments is insufficient proof of a § 2(d) violation in the absence of a showing that proportionally equal payments were not made to competitors.

The evidence before the Commission on this point is indeed scanty. Meyer's tobacco buyer testified that she had initiated the negotiations leading, upon submission of bills to Phillip Morris, to receipt of these payments. A Phillip Morris representative characterized these payments, by implication, as "special deals." He testified that these "special deals" were not offered to his company's customers as a matter of course nor publicized in any way, and that he could not recall offering similar proposals to customers other than Meyer. The general manager of Oregon Piggly Wiggly Company, an allegedly disfavored Portland retailer, testified that that organization had received no promotional allowances from Phillip Morris in or for promotional activities

during September, 1956 and that the only payment received[9] during the months of March through May of 1957 was a $357.75 contribution toward the cost of soft drinks given away on the sale of cigarettes. Testimony of personnel of United Grocers, the other Portland purchaser allegedly discriminated against, was to the general effect that that organization had received no promotional allowances during 1956 and 1957 other than the tobacco industry's normal promotional payments adverted to in note 9, *supra*.

On the basis of this evidence, the Commission concluded that the payments received by Meyer were *in addition to* "regular" promotional payments, that they were not made proportionally available to other, competing retailers of the same goods, and moreover, that they were "virtually incapable of being offered on proportionally equal terms." We cannot say that that conclusion was erroneous as a matter of fact.[10]

This instance merely points out two factors common to Commission proceedings and to our review of them. First, those witnesses in possession of the most enlightening evidence are usually representatives of respondents or potential respondents, who have an interest in revealing only what they must and in volunteering nothing. Second, application of the Commission's reserve of expertise to this sometimes painfully extracted testimony may produce conclusions, and valid conclusions, quite different from those which an uninitiated fact-finder might reach. And, of course, the Commission and its Hearing Examiner are closer to the facts than we are, and we cannot discount the justifiable effect which weak and evasive responses, apparent even on the face of this cold record, may have had on them. It is worth noting, for example,

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[9]We do not concern ourselves here with the regularly-advertised, volume-based promotional allowances which both parties concede were made proportionally available.

[10]"A course of conduct under which a seller fails to inform respecting such compensation or make known his terms or otherwise to offer them to one customer while granting payment for services to his rival reseller essentially represents concealment. In such case, the credit or allowance is not 'available' to the unfavored competitor, for all practical purposes a withholding and denial of opportunity to share occur, and the law is violated." *Kay Windsor Frocks, Inc.*, 1954, 51 F.T.C. 89, 95. *Cf. Vanity Fair Paper Mills, Inc. v. FTC*, 2 Cir., 1962, 311 F.2d 480, 484-86.

that while the Commission set aside many of the conclusions of the Examiner here, it is agreed with him that the Phillip Morris payments were not offered to other purchasers on a proportionally equal basis; both opinions relied heavily, perhaps primarily, on the testimony of Phillip Morris' representative, who nowhere testified affirmatively to such a state of facts. In sum, the evidence is weak but not insufficient.

Meyer, however, attacks on other grounds, claiming that the Commission erred in classifying United Grocers as a retailer rather than a wholesaler. If this is true, then it and Meyer compete at different functional levels and, according to petitioner, therefore there is no obligation on Phillip Morris (under *Tri-Valley Packing Ass'n, supra*) to offer it proportionally equal promotional benefits.

There is a broad gamut of possible organization of functions, and in that range a buying cooperative such as United Grocers may function as an agent of each retailer-member, as a wholesaler, or as something between those extremes. We think that, within limits, classification here is in the province of the finder of fact. While we have some difficulty accepting the Commission's conclusion that United Grocers is "plainly" a retailer,[11] we find it unnecessary to decide the question ourselves since we uphold the Commission's finding of discrimination against Oregon Piggly Wiggly Company, concededly in functional competition with petitioner.

The question of law which accompanies the foregoing factual determination, whether a 2(d) violation may exist where the favored and nonfavored customer inhabit different functional levels, was settled in Meyer's favor in *Tri-Valley Packing Ass'n v. FTC, supra.*

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[11]The organization and operation of United Grocers, as reflected in this record, seems quite similar to that of Central Grocers, Inc., a quasi-cooperative owned by its retailer-members, which we treated as a wholesaler in *Tri-Valley Packing Ass'n v. FTC, supra,* at 706-10.

II. ARE THE PAYMENTS RECEIVED FROM SUPPLIERS IN CONNECTION WITH THE COUPON BOOK PROMOTIONS COGNIZABLE UNDER SECTIONS 2(a) AND 2(f) OF THE CLAYTON ACT?

Meyer tenders, as the first of two "threshold questions," the proposition that no part of the payments here made by Burlington Industries, Tri-Valley, and Idaho Canning can be held violative of section 2(a) of the Clayton Act. This conclusion, it says, is compelled by the facts that "(1) the coupon book promotion was an institutional promotion involving a combination of advertising and promotional services furnished by or through Fred Meyer 'in connection with the processing, handling, sale or offering for sale' of the individual supplier's products, and (2) the payment of each supplier was made pursuant to agreement with Fred Meyer which contemplated, and was tied directly to, the furnishing of promotional services and facilities by Fred Meyer in connection with the resale of the products of the participating suppliers." It reasons that the "ultimate legal question here involved" is whether the payments made are to be classified as price reductions (cognizable under 2(a) and therefore under 2(f)) or promotional payments, that the latter classification is the proper one, and therefore that the purported violations are cognizable if at all only under section 5 of the Federal Trade Commission Act. Several subsidiary arguments are advanced as well, and will be examined below.

Commission counsel respond that sections 2(a) and 2(d) are not mutually exclusive, that in fact they overlap in such a manner as to bring the payments here under the prohibition of both sections. There is some support in the commentators and case law for this position, see Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act 126 (2d ed. 1959); *cf. Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 8 Cir., 1945, 150 F.2d 988, 990, 993, *cert. denied*, 326 U.S. 773; *Sun Cosmetics Shoppe v. Elizabeth Arden Sales Corp.*, S.D. N.Y., 1949, 82 F. Supp. 687, 688, *rev'd on other grounds*, 2 Cir., 1949, 178 F.2d 150; Conference Report, H.R. Rep. No. 2951, 74th Cong., 2d Sess. at 5.

However, it is not necessary that that question be decided here. We agree with the Commission that a multipartite transaction may

in its separate parts violate separate prohibitions of the Robinson-Patman Act. So here. The Commission found that the first $350 payment by each supplier constituted a true promotional payment for which it received value in Meyer's promotional services rendered, and that the balance of each payment, tied as it was to the volume of goods sold and ranging in amount up to one-third of the regular price to Meyer of those goods, constituted a distinct price discrimination, cognizable under section 2(a). We cannot agree with Meyer that the Commission made this classification "arbitrarily." While it claims that the Commission erred in finding that all participating suppliers paid a flat rate of $350 per coupon book page, it does concede that a very substantial percentage of suppliers paid this or some similar flat rate. And while it is correct in asserting that services rendered need not be shown precisely to equal promotional payments received, see *Giant Foods, Inc.*, 1961, 58 F.T.C. 977, 1010; *Lever Bros.*, 1953, 50 F.T.C. 494, 511, the relationship between payments received and promotional services rendered cannot be unreasonable, see *Giant Foods, Inc., supra.* Here the payments received from Tri-Valley in 1957 exceeded $350 by $4,814 (20,750 coupons redeemed in merchandise at $.232 per coupon), from Idaho Canning in 1957 by $2,585 (21,367 coupons redeemed at $.121), from Cannon Mills in 1956 by about $400, and from Burlington Industries in 1957 and 1958 by a total of about $2,800. In view of such substantial disparities between receipts and proved allocable expenses, we think the Commission correctly decided that these excesses were "outright price concessions" and, since the amounts were directly related to and dependent upon the amount of goods purchased and resold by Meyer, price concessions cognizable under section 2(a) rather than under section 5 of the Federal Trade Commission Act. *Cf. National Tea Co.*, 1950, 46 F.T.C. 829, *order modified*, 1951, 47 F.T.C. 1314.

But, says Meyer, the Commission itself has determined, in proceedings against these suppliers, that some of the payments we consider here were promotional, not price concessions. This contention has no substance. We cannot concern ourselves with questions of Commission strategy or Commission decisions as to whom to prosecute and for what acts. Even a successfully completed proceeding against a supplier for a 2(d) violation would not neces-

sarily foreclose a contemporaneous or subsequent action against an inducing buyer for a 2(a)-2(f) violation where the payments involved violate both sections.

III. DOES SECTION 2(d) OF THE CLAYTON ACT REQUIRE A SELLER TO OFFER PROPORTIONALLY EQUAL BENEFITS TO ITS CUSTOMERS AT DIFFERENT FUNCTIONAL LEVELS?

This is the second "threshold question" asserted by Meyer. The Commission concedes that, to sustain the position taken by it in its opinion, we would have to "reconsider" our decision in *Tri-Valley Packing Ass'n, supra,* where we held, on facts essentially identical with those produced here, that "no section 2(d) violation was shown as to the wholesale operation of Hudson House, because that operation was not in functional competition with Meyer . . .", *id.* at 710. However, it urges us to overrule *Tri-Valley* because, it says, the issue was not fully briefed or argued there, the result was plainly contrary to the language of the Clayton Act and was other than that intended by Congress when it passed the Robinson-Patman Act, and the effect of the case was to immunize a practice intended to be stamped out by that legislation, specifically, the bringing to bear of the economic power of the chains upon suppliers to wring from them prices lower than smaller and less powerful unorganized retailers can extract.

But the issue was considered and considered at length, as a reading of that opinion demonstrates, the "intent" of Congress is not as clear as respondent asserts, and no concrete showing of any increase in abuse by large buyers of their inherent power has been made here. Consequently, we are not inclined after so short a time to re-examine that decision, and adhere to the result reached there.

IV. DID MEYER KNOW OR HAVE REASON TO KNOW THAT THE CONCESSIONS IT INDUCED WERE DISCRIMINATORY AND UNLAWFUL?

The Commission found that Meyer knew or had reason to know that the payments it received were unlawful. That is one of the elements of proof required by section 2(f) and given content by

Automatic Canteen Co. v. FTC, 1953, 346 U.S. 61, 79-81. The Court also held that the ordinary elements of a section 2(a) case must be shown. As explained below, we think the 2(a) elements have been adequately proved, and that the only serious question is as to Meyer's knowledge. That, too, we resolve in the Commission's favor.

A. *The necessity of "pressure" or coercion.*

Meyer seems to take the position that the Commission must establish that the buyer exerted "pressure", see *Automatic Canteen, supra*, at 79, amounting to outright extortion, conceding that in that case the coercion would render the buyer's claimed lack of knowledge culpable, see *American News Co. v. FTC*, 2 Cir., 1962, 300 F.2d 104, 107. We think that *Automatic Canteen* does not go so far.

First, we do not understand the Court to have gone beyond the simple statutory requirement of "inducing" (and clearly petitioner "induced" the payments it received here); we take its words as being more of description than of measurement. Second, "pressure" may be brought to bear in a variety of ways, overt and covert, and petitioner here obviously applied some pressure. This, the fact of Meyer's self-professed market power, and the Commission's superior fact-finding position are sufficient to persuade us not to declare groundless its finding that, whatever may be the degree of "pressure" necessary to sustain a 2(f) violation, that pressure existed and was successfully applied.[12]

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[12]We need not finally decide here whether actual coercion is necessary to establish the prima facie case, nor do we intimate any view on the result should such overt coercion not be shown.

We do note, however, that the Congress was aware at the time of passage of the Robinson-Patman Act that "it is the manufacturer's recognition that the chain, with its tremendous purchasing and distributing power, may do those things ["buy the goods elsewhere, proceed to manufacture its own, or conduct its stores so as to discourage therein the sale of the recalcitrant manufacturer's goods"] and not the 'threat' of the chain to do them that is the real inducement for granting the special concession." *Final Report on the Chain-Store Investigation*, S. Doc. No. 4, 74th Cong., 1st Sess., p. 49 (1934).

As to violations of § 5 of the Federal Trade Commission Act, no showing of "coercion" is necessary. *R. H. Macy & Co. v. FTC*, 2 Cir., 1964, 326 F.2d 445, 447.

B. *The effect of quantity differences.*

Next, Meyer points to *Automatic Canteen's* requirement that where the quantities sold to the favored and non-favored buyers are not the "same"—which we interpret as meaning substantially the same—the Commission must only show that such differences could not give rise to "sufficient [cost] savings . . . to justify the price differential" and that the buyer should have so known. Meyer insists that the quantity differentials are too great here to permit the Commission's inference that Meyer had reason to know that the differentials could not be cost-justified, and therefore that Count I of the complaint must fall.

Those quantity differences were indeed large; large enough, we assume, to cast on the Commission the burden of showing that petitioner knew or should have known that they still could not be cost-justified. Was that burden carried here? We think it was. The Commission relied on several factors in reaching its conclusion that Meyer had reason to believe[13] that its suppliers could have no cost justification defense. First, none of the suppliers involved grant quantity discounts. Second, Meyer itself pays the going price during the other eleven months of the year. From this the Commission infers, and fairly, that no measurable cost savings are produced by petitioner's somewhat larger sales and related purchases during the one-month promotion.[14] It buttresses that conclusion by a similar inference drawn from the fact that, during those eleven months, Meyer's sizeable purchases and its competitors' substantially smaller purchases are made at the same price. Third, the price concessions Meyer obtained from Idaho Canning and Tri-Valley amounted to a full third of the regular price. This, with and particularly against the background of the other two factors, led the Commission to the conclusion that peti-

[13]The inquiry here was devoted to ascertaining this fact, not to whether cost justification did or did not exist in fact. No cost studies were introduced by either party.

[14]Meyer suggests but failed to prove that its sales during the balance of the year were significantly lower. Such a failure to introduce evidence within its possession probably strengthens and certainly cannot weaken the Commission's conclusion. See *Mammoth Oil Co. v. United States*, 1927, 275 U.S. 13, 52; *cf. Vanity Fair Paper Mills, Inc. v. FTC*, 2 Cir., 1962, 311 F.2d 480, 485-86; 2 *Wigmore, Evidence*, p. 164 (3d ed. 1940).

tioner "should have known" something was amiss. We cannot say that inference is unwarranted. That the Commission did not prove the costs of the suppliers is immaterial. Cost surveys are expensive and labyrinthine proceedings whose results are often dependent upon the cost accounting theory used. To require them in all proceedings, even against buyers, would too often be an exercise in futility. At least where the facts and the inferences to be drawn are as clear as they are on this point, we think the method of proof adopted by the Commission here is appropriate to its end, that of showing that the buyer "is not an *unsuspecting recipient* of prohibited discriminations," *Automatic Canteen, supra,* at 81. (Emphasis added.)

Obedient to the command of *Automatic Canteen,* the Commission also inquired into possible cost differences to the seller in "sale or delivery," *id.* at 80. However, in finding that there were no such savings, it relied only on (1) testimony of Meyer's employees to the effect that the increased purchases for the promotion resulted in no changes in Meyer's costs or procedures which might provide cost savings for the suppliers and (2) testimony of a supplier's employee which we think unsatisfactory. Meyer attacks the sufficiency of this evidence, pointing to other evidence in the record which does tend to show that its suppliers' methods of sale and intensity of sales effort differed as between Meyer's regular purchases and special promotion purchases. But we believe that the Commission could find, from the *elements* of the testimony referred to above, that Meyer continued for the most part to purchase in usual method, on its usual terms, and that such differences as might have existed were inconsequential.

In summary, we consider that the evidence which supports the Commission's finding that Meyer had reason to believe that the discriminatory terms and prices it received were not cost-justified is weak but not insufficient. This conclusion is buttressed by the fact that *Automatic Canteen* itself pointed out that "the showing of knowledge . . . will depend to some extent on the size of the discrepancy between cost differential and price differential . . . . A showing that the cost differences are very small compared with the price differential should be sufficient." *Id.* at 80. Here the Commission had before it evidence from which it could infer that manufacturing, selling and delivery cost savings were neg-

ligible. The price differential amounted to as much as one-third of the regular price. That, in the circumstances of this case, is enough to satisfy *Automatic Canteen's* requirement of a cost/price comparison.

C. *Competitive injury.*

Meyer also questions the reasonableness of the Commission's finding of competitive injury. It cites *American Oil Co. v. FTC*, 7 Cir., 1963, 325 F.2d 101, 106, *cert. denied*, 377 U.S. 954 to support its conclusion and claims that the Commission's dismissal of a related proceeding, *In re Cannon Mills Co.*, 1964, 3 CCH Trade Reg. Rep. ¶16,878, on this ground constitutes an "acknowledge[ment] that the nature of the concessions received by Fred Meyer for the coupon promotions were not such as to create a reasonable probability of substantial injury to competition within the meaning of section 2(a)."

But *American Oil* is not such substantial support as Meyer thinks. There a section 2(a) charge grew out of a retail gasoline price war, during the course of which American supplied its dealers in the battle zone at lesser prices than those it charged elsewhere. The conflict raged for only 17 days and every station in the area participated. On these facts the court held that only slight and non-recurring injury below the statutory level of notice took place and that it would have taken place whether or not American had lowered its own prices. The case is obviously different where the discrimination recurs regularly and has a substantial impact upon competition. This is the situation here. We think this case is closer to those systematic and permanent discriminatory pricing systems held invalid in such cases as *FTC v. Morton Salt Co.*, 1948, 334 U.S. 37 (discriminatory volume discounts) and *Corn Prods. Ref. Co. v. FTC*, 1945, 324 U.S. 726 (systematic discrimination based on "phantom" freight charges and other factors) than to the one disclosed by *American Oil*, and so affirm the Commission's conclusion.

D. *The duty of inquiry.*

The Commission held that "a buyer who initiates a promotional service and induces his suppliers to pay him for performing it has possessed himself of 'information sufficient to put upon it the

duty of making inquiry to ascertain whether the suppliers were making such payments available on proportionally equal terms to [his] competitors,'" relying on, inter alia, *Giant Foods, Inc. v. FTC*, D.C. Cir., 1962, 307 F.2d 184, 187, *cert. denied*, 1963, 372 U.S. 910. The consequence of such a rule is that where sufficient facts exist, the buyer has that knowledge which section 2(f)—and F.T.C. Act § 5, under the general assimilation of Robinson-Patman standards of liability and proof—requires. Meyer attacks that holding on a variety of grounds.

First, it says, that rule is applicable only where the buyer's receipt of payments is "culpable." and cites a number of cases[15] for the proposition that "there is a presumption that men obey the law." But knowledge of probable illegality is equivalent to "culpability", *American Motor Specialties, Inc. v. FTC*, 2 Cir., 1960, 278 F.2d 225, *cert. denied*, 364 U.S. 884; *cf. Giant Foods, Inc., supra*, and Meyer had knowledge of at least sufficient facts to create a reasonable suspicion that the payments it received were probably illegal. Hence the "presumption" whose benefit Meyer claims cannot apply. Rather, the duty to inquire arises. *Giant Foods, Inc. v. FTC, supra;* see *Grand Union Co. v. FTC*, 2 Cir., 1962, 300 F.2d 92, 100; *American News Co. v. FTC*, 2 Cir., 1962, 300 F.2d 104, 110, *cert. denied*, 371 U.S. 824.

Second, Meyer claims error in the stated grounds for the Commission's finding that Meyer must have known the payments it received to be incapable of proportionalization. The Commission here appears to have relied on statements in petitioner's solicitation material requiring that "Offer Must be Exclusive at Fred Meyer During the 4 Week Period" and asserting that its coupon book scheme represented a "unique" promotional device, in reaching its conclusion that the coupon book payments *could not be proportionalized*. It found support for this and for its holding that Meyer must have known that the payments solicited from Phillip Morris were disproportional in *Giant Foods, Inc., supra*, at 187. There an agreement in the buyer's promotional contracts

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[15] *United States v. Detroit Lumber & Timber Co.*, 1906, 200 U.S. 321; *Athens Roller Mills, Inc. v. Commissioner*, 6 Cir., 1943, 136 F.2d 125, 128; *Fidelity & Deposit Co. v. Grand Nat'l Bank*, 8 Cir., 1934, 69 F.2d 177, 183; *St. Joseph Stockyard Co. v. United States*, 8 Cir., 1911, 187 Fed. 104, 106.

with its sellers that "This contract does not alter or replace currently existing agreements between Giant Food Department Stores and participating manufacturers," was interpreted to mean that "Giant's program was designed to exist independently of and/or coextensively with any of its suppliers' regularly available cooperative advertising programs."[16] While we do not agree that a supplier could never proportionalize benefits to its other customers while participating in a program of the degree of "uniqueness" shown here, we do hold that in the circumstances, the Commission could find that benefits here could not be proportionalized, or at least that Meyer had reason to know of the high degree of unlikelihood that they could be. As the Commission's opinion points out, Meyer itself, for almost 30 years, has considered a four-week span in September and October to be the most propitious time for a promotion of this nature. Consequently a supplier's agreement with another customer to enter into an identical agreement at another time presumably would not result in equal benefit to either. And by petitioner's own claim, the coupon book plan assures the supplier of "mass distribution of your product at the lowest possible cost." In the absence of contrary evidence, *cf. R. H. Macy & Co. v. FTC*, 2 Cir., 1964, 326 F.2d 445, 450, the Commission was clearly entitled to take Meyer at its word and to draw the obvious inferences.

Third, Meyer argues that the record shows only that it operated an extensive information-gathering system, not that it learned by that system who its competitors in the sale of the goods involved here were nor what prices they actually paid. Therefore, it says, it could not know that it was receiving discriminatory prices, and the whole complaint must fall.

The Commission characterized Meyer's investigative activities as a "vigorous intelligence network," finding that Meyer regu-

[16]Meyer claims that the Commission was not entitled to rely on the material which we have quoted from its solicitations for participation for the reason that "the record . . . contains no explanation of the meaning, purpose, or operation of the language." But *for that very reason* we think the Commission was entitled to rely on the plain meaning of the words. Meyer was in a better position than anyone else to show that the words do not mean what they seem to say. Therefore it should bear the burden of disproof, under balancing of convenience and fairness, see *Automatic Canteen, supra.*

larly monitored all grocery retailer advertisements on both a local and national scale, engaged in "comparison shopping" of competitive stores, purchased and tested competing goods, and regularly reviewed price bulletins distributed by suppliers and brokers serving the area.

It must be remembered that the inquiry here is as to what petitioner knew *or had reason to know*. Meyer obviously had a great deal of the trade knowledge referred to in *Automatic Canteen, supra*. It is a fair inference that it was aware that, as several witnesses testified, both wholesalers and retailers in the grocery industry operate on a profit margin approximating 2%, that mark-ups on the goods in question are often lower than the price concessions it received, and that customers can be "switched" from one retailer to another simply by reason of a few cents' difference in price on particular items. Meyer itself carefully required of its special promotion suppliers that "Offer Must Be Exclusive at Fred Meyer During the 4 Week Period."

Against this background the mere fact that the record fails to show exact knowledge by Meyer of the precise identity of each competitor in each particularized kind and grade of goods and of the prices paid by competitors for them cannot avail the petitioner: It had "reason to know." See *Giant Foods, Inc. v. FTC, supra; Grand Union Co. v. FTC, supra; American News Co. v. FTC, supra; cf. Automatic Canteen Co. v. FTC, supra,* at 79-80; *Tri-Valley Packing Ass'n v. FTC, supra,* 329 F.2d at 708-09.

V. DOES FEDERAL TRADE COMMISSION ACT § 5 REACH INDUCEMENT OF DISCRIMINATORY PROMOTIONAL ALLOWANCES?

We must resolve, for the first time in this circuit, the question whether the Commission may proceed against a buyer under § 5 of the Federal Trade Commission Act for inducing and receiving a discriminatory promotional allowance, a practice not expressly declared unlawful, as to buyers, by the Robinson-Patman Act, nor to sellers where, as here, the discrimination is among purchasers at different functional levels of competition. *Tri-Valley Packing Ass'n v. FTC,* 9 Cir., 1964, 329 F.2d 694, 708. The Commission takes the position that it has such power. Meyer disagrees.

This is not an entirely novel question; two other Courts of Appeals have considered similar problems and side with the Commission, see *R. H. Macy & Co. v. FTC*, 2 Cir., 1964, 326 F.2d 445; *Giant Foods, Inc. v. FTC*, D.C. Cir., 1963, 307 F.2d 184, *cert. denied*, 1963, 372 U.S. 910; *American News Co. v. FTC*, 2 Cir., 1962, 300 F.2d 104, *cert. denied* 371 U.S. 824; *Grand Union Co. v. FTC*, 2 Cir., 1962, 300 F.2d 92; see also *FTC v. J. Weingarten, Inc.*, 5 Cir., 1964, 336 F.2d 687, 693, *cert. denied*, 1965, ... U.S. ..... No case has rejected the result these circuits have reached. We find the reasoning of those cases persuasive, and adopt it. We therefore sustain the Commission here.

VI. THE COMMISSION'S ORDER.

Finally, Meyer challenges both the scope of the resulting order and the fact that it is addressed to the two senior officers of the corporation as well as to the corporation itself.

A. *The Officers.*

According to Meyer, the facts are that Fred G. Meyer, the chairman of the board of directors of Fred Meyer, Inc., owns only a minority of the outstanding shares (38.35%), "has nothing to do with the advertising and sales policies of the corporate petitioner," and "is not even familiar with the operation of the coupon book program." Earle A. Chiles, petitioner's president, concededly is "generally responsible for merchandising operations, but only at a policy-making level," and owns 14.37 percent of the stock. These facts, it claims, are insufficient to support an order running directly to these men as individuals and officers of the corporation.

When these attributes are taken singly, petitioner's position may in some circumstances be correct, see *Ostermoor & Co. v. FTC*, 2 Cir., 1927, 16 F.2d 962; *In re Maryland Baking Co.*, 1956, 52 F.T.C. 1679, 1691. But the Commission found that this, a "family" corporation (the individuals and their families own almost all of the corporate stock), was "nothing but the 'alter ego' of those two individual respondents." Moreover, Chiles himself testified that "we set the policies and review the practices." And Meyer was originally responsible for instituting the coupon book promotion. We think that, despite Meyer's denials of knowledge of the operations of the business, the Commission was justified in

concluding that "if 'a majority of Portland's 120,000 families' were apprised of the details of these programs, we think it is fair inference that the Chairman of the Board also knew about them," [r. 138.] and in joining both as respondents. See *Mandel Bros., Inc. v. FTC*, 7 Cir., 1958, 254 F.2d 18, 22, *rev'd on other grounds*, 1959, 359 U.S. 385; *cf. Western Fruit Growers Sales Co. v. FTC*, 9 Cir., 1963, 322 F.2d 67, 69-70, *cert. denied*, 376 U.S. 907.

B. *The Scope of the Order.*

The Commission's Final Order commands that the corporate petitioner and its two named officers cease and desist from

> "Knowingly inducing, or knowingly receiving or accepting, any discrimination in the price of such products by directly or indirectly inducing, receiving, or accepting from any seller a net price respondents know or should know is below the net price at which said products of like grade and quality are being sold by such seller to other customers where respondents are competing with the purchaser paying the higher price or with a customer of the purchaser paying the higher price."

This we refer to as the 2(a)-2(f) order. They are further ordered to cease and desist from

> "Inducing and receiving anything of any value from any supplier as compensation or in consideration for services or facilities furnished by or through respondents in connection with the processing, handling, sale or offering for sale of products purchased from such supplier, when respondents know or should know that such compensation or consideration is not being affirmatively offered or otherwise made available by such supplier on proportionally equal terms to all of its other customers competing with respondents in the sale and distribution of such supplier's products, including other customers who resell to purchasers who compete with respondents in the resale of such supplier's products."

This we refer to as the § 5 order. Meyer attacks both orders on the grounds that they bear no reasonable relationship to the practices found to be unlawful and that they fail to mention or limit themselves to the coupon book promotion. Moreover, it says,

the 2(a)-2(f) order is too broad in that it is not confined to the narrow product categories in suit, and because (as we make out the argument) Meyer might not know that products of like grade and quality being sold in competing outlets were sold to those outlets by its own seller. The section 5 order is claimed to be improper because it is not limited to the specific unlawful practices found here and because it applies to "other customers who resell to purchasers who compete with respondents," *i.e.*, those wholesalers whom we held to be not under the protection of section 2(d) in *Tri-Valley Packing Ass'n, supra.*[17]

Under what is sometimes called the Clayton Finality Act, adopted in 1959, 15 U.S.C. § 21, the Commission's order, when it becomes final, subjects respondents to a $5,000 penalty for each violation, and, where the violation is continuing, to $5,000 per day penalty while it continues. This, we think, requires that Commission orders be more carefully framed than formerly, and that they no longer be a mere command to obey the statute. This, we think, is the effect of Mr. Justice Brennan's caveat in *FTC v. Henry Broch & Co.*, 1962, 368 U.S. 360, at 367-68. There he said:

> "We do not wish to be understood, however, as holding that the generalized language of paragraph (2) would necessarily withstand scrutiny under the 1959 amendments. The severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application."

In *Swanee Paper Corp. v. FTC*, 2 Cir., 1961, 291 F.2d 833, 837-38, *cert. denied*, 1962, 368 U.S. 987, a § 2(d) case, the court said:

> "Administrative agencies have wide discretion in framing their orders and are empowered to enjoin other related unlawful acts which may occur in the future . . . but there must be some relation between the facts found and the breadth of the order . . . . Moreover, the order is not even limited

[17]Meyer attacks various isolated phrases of this order as well, but an examination of the language to which it objects reveals that such language, though included in the Hearing Examiner's proposed order, was not included in the Commission's final order quoted above.

> to related activities but enjoins Swanee from violating Section 2(d) in the very words of the statute . . . . Moreover, the order as written is so broad that, under the new enforcement provisions of the Clayton Act (15 U.S.C.A. § 21), the duty of enforcing the prohibitions of Section 2(d) as to Swance is shifted from the Commission to the federal courts, which may in the future be forced to decide the very issues that Congress has entrusted the Commission to determine . . . . [W]e therefore hold that the order should be limited to the particular practice found to violate the statute."

The court directed, under its rule 13(l), that the Commission prepare an order in conformity with the court's opinion. A similar result was reached in *Grand Union Co. v. FTC*, 2 Cir., 1962, 300 F.2d 92, 101-2, a § 5 case involving, as this one does, violation of § 2(d), and for similar reasons. To the same effect is *American News Co. v. FTC*, 2 Cir., 1962, 300 F.2d 104, 111, also a § 5-§ 2(d) case. See also *Joseph A. Kaplan & Sons, Inc. v. FTC*, D.C. Cir., 1965, 347 F.2d 785, 788-91.

We think that the order here is subject to many of the strictures levelled by the courts at the orders involved in the foregoing cases. We reject, however, the contention that the order should be restricted to the specific products involved in the violations proved, or to any specific product. The scheme involved is much broader, and an order can properly be directed against such a scheme or comparable ones. We think that the order goes much beyond that and should be so limited. The 2(a)-2(f) order also seems, on its face, to exclude the normal defenses to a section 2(a) violation charge. This, we think, is improper. The section 5 order covers "processing, handling," not here involved. The language in that order: "including other customers who resell to purchasers who compete with respondent in the resale of such suppliers' products" must be stricken. The order is also overly broad as to the two individuals; it should be limited to activities related to the business of Fred Meyer, Inc.

The Commission knows how to draw narrower orders. (See *The Quaker Oats Co.*, CCH Trade Reg. Rep., 1961-63 Transfer Binder, ¶ 15,858; *Vanity Fair Paper Mills, Inc.*, CCH Trade Reg. Rep., 1961-63 Transfer Binder, ¶ 15,796; *Transogram Co.*, CCH

Trade Reg. Rep., 1961-63 Transfer Binder, ¶ 16,080; *All-Luminum Prods., Inc.*, 3 CCH Trade Reg. Rep. ¶ 16,665.) It is the expert body. We leave to it the preparation of an order consistent with this opinion.

The order, when properly modified, will be enforced. The Commission shall prepare a proposed decree, conforming to this opinion, pursuant to our Rule 34, subparagraph 12.

APPENDIX B

United States Court of Appeals
for the Ninth Circuit

No. 18,903

FRED MEYER, INC., a corporation, and FRED G. MEYER and EARLE A. CHILES, individually and as officers of said corporation, PETITIONERS,

v.

FEDERAL TRADE COMMISSION, RESPONDENT.

(Filed July 1, 1966)

WM. B. LUCK, CLERK

Final Decree

Petitioners herein having filed in this Court on September 17, 1963, a petition to review and set aside an order to cease and desist issued against them on July 9, 1963, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of Fred Meyer, Inc., a corporation, and Fred G. Meyer and Earle A. Chiles, individually and as officers of said corporation, Docket No. 7492," and the matter having been heard by this Court on the record and briefs on June 9, 1965, and this Court having rendered its decision on March 18, 1966,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the aforesaid order to cease and

desist be, and it hereby is, modified to read as follows:

IT IS ORDERED that respondent Fred Meyer, Inc., a corporation, its officers, agents, representatives and employees, and Fred G. Meyer and Earle A. Chiles, individually and as officers of and in connection with activities related to the business of respondent Fred Meyer, Inc., in connection with the offering to purchase or purchase by or on behalf of respondent Fred Meyer, Inc., in commerce, as "commerce" is defined in the amended Clayton Act, of products for resale in outlets operated by respondent Fred Meyer, Inc., do forthwith cease and desist from:

Knowingly inducing, or knowingly receiving or accepting, in connection with any promotional scheme consisting of distribution of coupons to and return of coupons by consumers in connection with the purchase by consumers of products offered for resale in retail outlets of respondent Fred Meyer, Inc., or in connection with any comparable scheme, any discrimination in the price of such products by directly or indirectly inducing, receiving or accepting from any seller a net price respondents know or should know is:

(a) below the net price at which such products of like grade and quality are being sold by such seller to any other purchaser with whom respondent Fred Meyer, Inc., competes, or with whose customer or customers said respondent competes and

(b) not a price differential which makes only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which

products are sold and delivered by such seller and

(c) not a price change in response to changing conditions affecting the market for or marketability of such products, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned and

(d) not a price made in good faith to meet an equally low price of a competitor of the seller.

For the purpose of determining "net price" under the terms of this order, there shall be taken into account all discounts, rebates, allowances, deductions, or other terms and conditions of sale by which net prices are effected.

IT IS FURTHER ORDERED that respondent Fred Meyer, Inc., a corporation, its officers, agents, representatives, and employees, and Fred G. Meyer and Earle A. Chiles, individually and as officers of and in connection with activities related to the business of respondent Fred Meyer, Inc., directly or through any corporate or other device in or in connection with any purchase by or on behalf of respondent Fred Meyer, Inc., in commerce, as "commerce" is defined in the Federal Trade Commission Act, of products for resale in outlets operated by respondent Fred Meyer, Inc., do forthwith cease and desist from:

Inducing or receiving anything of any value from any supplier as compensation for or in consideration of advertising, promotion, or display services or facilities furnished by or through Fred Meyer, Inc., in connection with any promotional scheme consisting of distribution of coupons to

and return of coupons by consumers in connection with the purchase by consumers of products offered for resale in retail outlets of respondent Fred Meyer, Inc., or in connection with any comparable program, or in connection with any actual or purported promotion or special sale of particular products to be conducted by or on behalf of respondent Fred Meyer, Inc., when respondents know or should know that such compensation or consideration is not being offered or otherwise made available by such supplier on proportionally equal terms to all of its other customers competing with respondent Fred Meyer, Inc., in the sale of such supplier's products.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the aforesaid order to cease and desist as so modified be, and it hereby is, affirmed, and that petitioners be, and they hereby are, ordered to obey and comply with said order as so modified.

GILBERT H. JERTBERG,
BEN C. DUNIWAY,
United States Circuit Judges.
ROGER D. FOLEY,
United States District Judge.

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No. 789

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

FEDERAL TRADE COMMISSION, *Petitioner,*

v.

FRED MEYER, INC., ET AL.

On Cross Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO CROSS PETITION

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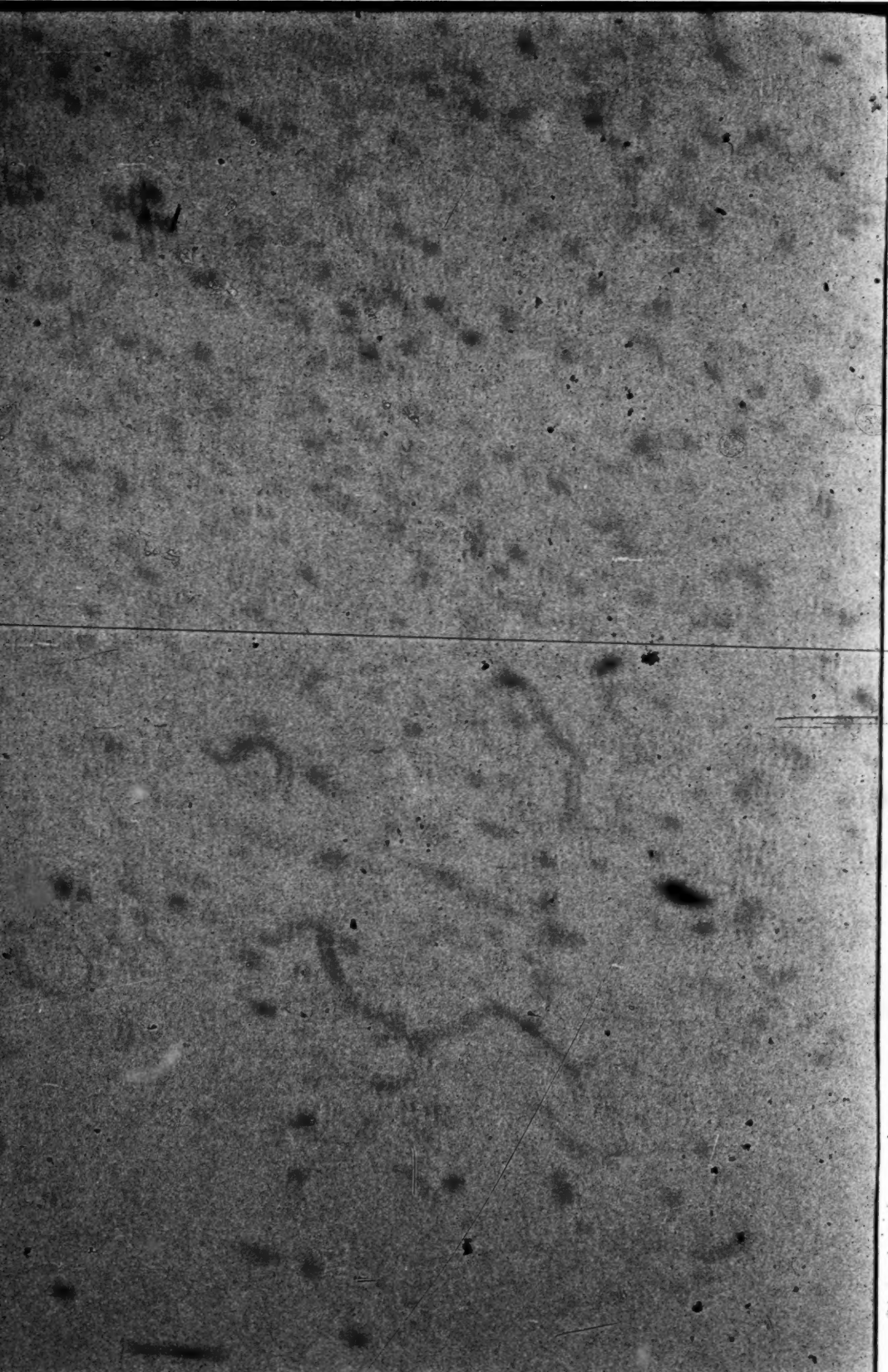

IN THE

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FRED MEYER, INC., ET AL.

On Cross Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION TO CROSS PETITION

This brief is filed on behalf of Fred Meyer, Inc., a corporation, and Fred G. Meyer and Earle A. Chiles, individually and as officers of said corporation, in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit filed by the Solicitor General on behalf of the Federal Trade Commission. While not designated as such, the petition is a cross petition to the petition filed by respondents in No. 703, this Term. The petition in No. 703 and the petition to which this opposing brief is filed (No. 789) seek review of separate aspects of a single judgment of the Ninth Circuit Court of Appeals entered on July 1, 1966.

The cross petition was filed on November 21, 1966. By order of the Clerk of this Court, the time for filing this brief in opposition was extended to January 18, 1967.

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that Section 2(d) of the Robinson-Patman Act does not require a supplier to grant proportionate promotional allowances to customers which operate at different and distinct functional levels of distribution and do not compete in the resale of such suppliers' products.

2. Whether it was error for the court of appeals to include in its order a recital of the statutory defenses to a charge of price discrimination when such defenses must be read into the order anyway, even if not specifically set forth.

STATEMENT

The cross petition seeks review of that portion of the judgment of the court of appeals which reversed the Commission's holding that respondent, a retailer, violated Section 5 of the Federal Trade Commission Act by knowingly inducing promotional allowances of $350 from two of its suppliers which were not granted to two of those suppliers' wholesale customers.[1]

The Commission held that Section 2(d) of the Robinson-Patman Act requires that a supplier grant or make available on equal terms to its wholesale customers any promotional allowances it grants to direct-

[1] The cross petition also seeks review, conditionally, of the court of appeals' modification of the Commission's Section 2(f) order. The Court is asked to review the order question only if it grants review of the order question presented in the petition for a writ of certiorari filed by respondents in No. 703, this Term.

buying retail customers, where the customers to whom the wholesaler resells compete with the direct-buying retailer (R. 85-95). While conceding that the products of the suppliers granting the allowances had not been shown to have actually reached the shelves of the retailer-customers of the two wholesalers (R. 94), the Commission held that competition between respondent and the retailer-customers of the wholesalers in the resale of those products had nonetheless been established (R. 95).

In reversing, the court of appeals declined to interpret the "customers competing" language of Section 2(d) as embracing customers operating at different and distinct functional levels. In order to base a finding of a Section 2(d) violation on the granting of disproportionate allowances as between retailers and wholesalers, the court of appeals held, it must be shown (1) that the retail customers to whom the wholesaler resells are "indirect" customers of the supplier granting the allowance, i.e., that such supplier engages in a course of direct dealing with the wholesalers' customers, and (2) that those "indirect" customers in fact compete with the favored direct-buying retailer in the resale of the product involved (Pet., App. A, pp. 8a, 9a).

The court of appeals' reversal was based upon an evidentiary finding that the proof was insufficient to establish either of the two requisites; the record established no "indirect" customer relationship between the suppliers and the customers of the wholesalers; nor did it provide sufficient evidence to support a finding that the wholesalers' retail customers in fact competed with respondent in the resale of the suppliers' products (Pet., App. A, pp. 8a, 9a).

ARGUMENT

1. The decision below, with which there is no conflict among the circuits, is correct and clearly consistent with accepted principles of statutory construction. Section 2(d) of the Robinson-Patman Act makes it unlawful for a supplier to grant promotional allowances to one customer unless the allowances are made "available on proportionally equal terms to all other customers competing in the distribution" of the supplier's products. The court of appeals held that for customers to be entitled to equivalent allowances under the statute, they must be in competition with each other in the resale of the products involved, and in order to be in competition with each other they must be at the same functional level.[2]

The Commission argues that the court of appeals' interpretation is contrary to Congressional purpose and that this Court's holding in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948), relating to Section 2(a) of the Act, is also applicable to Section 2(d). This is not so. By express language, Congress established a narrower concept of competition in 2(d) than it did in 2(a).

In 2(a), Congress prohibited price discrimination between purchasers where the effect may be to lessen or injure competition "with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." It

[2] The Commission had agreed with this interpretation for 27 years' enforcement of the statute, until its decision in this case. See *Atalanta Trading Corp.*, 53 F.T.C. 565, 566, 572 (1956), *reversed on other grounds, Atalanta Trading Corp.* v. *Federal Trade Commission*, 258 F.2d 365 (2d Cir. 1958); *Liggett & Myers Tobacco Co., Inc.*, 56 F.T.C. 221, 250-253 (1959).

was this language which led the Court to hold in *Morton Salt* that the concept of competition in Section 2(a) is broad enough to prohibit a seller from selling to a retailer at a price lower than that charged a wholesaler whose customers compete with the retailer. *No such language appears in Section 2(d).*[3]

Where Congress, in the Robinson-Patman Act, intended to expand the applicable concept of competition beyond a particular distributional level, it did so in express terms, as in Section 2(a). *Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505, 514-15 (1963). The language and reasoning of this Court in *Sun Oil*, in construing the term "competitor" in the meeting competition proviso of Section 2(b) as meaning one competing only at the seller's level, is apposite (*Ibid.*):

> Thus, since Congress expressly demonstrated in the immediately preceding provision of the Act that it knew how to expand the applicable concept of competition beyond the sole level of the seller granting the discriminatory price, it is reasonable to conclude that like clarity of expression would be present in § 2(b) if the defense available thereunder were similarly intended to be broadly read to encompass, as is urged, the meeting of lower prices set not only by the offending seller's competitor, but also by the purchaser's competitor. There is no reason appearing on the face of the statute to assume that Congress intended to in-

[3] The Commission argues that the result in *Morton Salt* would have been the same even if Congress, while retaining its present description of price discrimination in 2(a), "i.e., 'discriminate in price between different purchasers', had made it a per se provision like Section 2(d) and thus omitted completely all reference to the three levels of competition at which injury can occur" (Pet. p. 12, n. 6; R. 90-91). But this is precisely what Congress did *not* do in 2(a).

voke by omission in § 2(b) the same broad meaning of competition or competitor which it explicitly provided by inclusion in § 2(a); the reasonable inference is quite the contrary.

Applying this reasoning, it is both logical and necessary, in accordance with principles of statutory construction, to conclude that the language "customers competing" in (2d) means what it says, namely, persons who are in competition with each other. Customers of a particular supplier who are not at the same functional level are *not* competing customers. Thus 2(d) includes only persons competing at the customers' level and does not embrace all persons who engage generally in the overall distribution function.[4]

Apart from the correctness of the decision and the absence of conflict among the circuits, the petition should be denied for two other reasons.

(a) The Commission's interpretation would quite obviously have far-reaching effects in many segments of our economy. We do not believe this Court should decide the issue without full and comprehensive assessment of these effects in a practical context. This, however, is not possible on the record of this case. The complaint did not raise the issue directly and, at the time evidence was taken, it appeared established that a 2(d) violation could not be based upon dispropor-

[4] Further support for this construction is found in the fact that under 2(a) a reasonable probability of competitive injury must clearly and definitely be shown. Congress, on the other hand, made 2(d) a *per se* section. Because of the nature of *per se* violations and the absence of opportunity for affirmative justification, together with the fact that the Commission is relieved of the burden of showing injury, it is illogical to assume that Congress meant by its silence to include, by way of construction of 2(d), something which it expressly included in 2(a), a non-*per se* section.

tionate payments as between retailers and wholesalers.[5] Accordingly, respondents made no attempt to present evidence going to the issue.

Several practical considerations argue against adoption of the Commission's interpretation. These considerations require some evidentiary basis for proper assessment. Would not the Commission's interpretation, instead of correcting an alleged competitive disadvantage, really result in a windfall to the wholesaler? How can the wholesaler be compelled to pass the promotional allowance on to its retail customers? Furthermore, are wholesalers desirous of obtaining allowances which require performance of an advertising function,[6] and would a wholesaler be receptive to a program which would require it to obtain assurance of performance, and perhaps supervise performance, by its retail customers? Alternatively, even assuming there could be some sort of legal resale price or allowance maintenance by which a supplier could compel a wholesaler to pass on the allowance to the latter's retail customers, would the wholesaler be receptive to a program under which the supplier exercises such control? Would this not seriously impair the independence of the wholesaler and his ability to establish his own terms of sale and course of dealing? How, as a

---

[5] The complaint was issued on May 15, 1959 (R. 3-11). On September 9, 1959, the Commission, in its opinion in *Liggett & Myers Tobacco Co., Inc.*, 56 F.T.C. 221, 250-52 (1959), expressly declined to adopt the interpretation now proposed.

[6] While the record is far from sufficient on these practical issues, one wholesaler witness testified that his company "would not have been interested in an advertising allowance, as such, for our Wadham's brand" since it would demand "that we perform a function of advertising, which requires an expenditure of money" and "[n]one of our stores would have been interested in advertising the Wadham's grade of corn . . ." (R. 272-73).

practical matter, is the program to be administered? Is the wholesaler to be burdened with the task of maintaining the detailed records necessary to judge proportionality; and would any wholesaler be willing to assume this burden? In the normal situation the supplier does not even know the identity of many—if any—of its wholesalers' retail customers. How is the wholesaler to determine to which customers to pass on an allowance granted by a supplier when, as here (see R. 93-94), the supplier's products are commingled with products of other suppliers and there is no practicable means of determining which customers actually receive and resell a particular suppliers' product?

These and other practical problems should be considered on the basis of an evidentiary record before a definitive ruling on the issue presented by the Commission's petition is made.

(b) A further reason that the petition should be denied is that the basis of the court of appeals' reversal was, in part, evidentiary. Under either the Commission's theory that Section 2(d) requires proportionate treatment of wholesalers *whose customers compete with direct-buying retailers,* or the court of appeals' holding that 2(d) requires proportionate treatment of such customers of the wholesaler as are "indirect" customers of the supplier *which compete with direct-buying retailers,* the existence of actual competition in the suppliers' products at the retail level must be shown. The court of appeals, however, found that this prerequisite was not established by the evidence because it was not even shown that the products of the suppliers made their way to the shelves of the retailer-customers of the wholesalers. (Pet., App. A, pp. 8a, 9a). Being solely an evidentiary question,

we do not believe it is of any substantial importance to the enforcement of Section 2(d) or of any particular significance to any other case.

2. Nor is there any reason for this Court to review the second question presented. The court of appeals' inclusion in the Section 2(f) order of the statutory defenses to a price discrimination charge, in the words of the cross petition (Pet., pp. 14-15), merely makes "explicit what is implicit in every such order (*Federal Trade Commission* v. *Ruberoid,* 343 U.S. 470, 476)". The Commission's burden of proving a violation of the order in a penalty proceeding would, therefore, be exactly the same, whether the defenses are expressly recited in the order or not.

CONCLUSION

For the foregoing reasons, the cross petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1967

FEDERAL TRADE COMMISSION, PETITIONER

v.

FRED MEYER, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

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No. 27

FEDERAL TRADE COMMISSION, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (R. 117–143) is reported at 359 F. 2d 351. The opinion of the Federal Trade Commission (R. 41–103) is reported at C.C.H. Trade Reg. Rep. (F.T.C. Transfer Binder 1961–1963) ¶16,368, but is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1966 (R. 144). By orders of Mr. Justice Douglas of September 30, 1966, and October 24, 1966, the time for filing a petition for a writ of certiorari was extended to and including November 21, 1966. The petition was filed on November 21, 1966, and

was granted on February 13, 1967 (R. 149; 386 U.S. 907). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a supplier's granting to a retailer who buys directly from it promotional allowances that are not made available to a wholesaler who resells to retailers competing with the direct-buying retailer violates Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act.[1]

STATUTES INVOLVED

Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13, provides in pertinent part as follows:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of

[1] A certiorari petition seeking review of certain other aspects of the court of appeals' decision involved in the instant case was filed by Fred Meyer, Inc. (No. 703, 1966 Term). Petitioners there sought to challenge the court below's conclusion that the Commission's findings with respect to knowledge of illegality were supported by substantial evidence, and also questioned the scope of one part of the modified cease-and-desist order. That petition was opposed by the Commission; in addition, the Commission indicated that, should certiorari be granted in No. 703, it desired to preserve a question relating to the scope of the order as well (Pet., No. 789, 1966 Term, pp. 2, 14–15). Certiorari was denied in No. 703, on February 13, 1967. 386 U.S. 908. Accordingly, the only question presented in the instant case is whether the court below improperly restricted the reach of Section 2(d) to the same functional level of competition, and the Court's grant of certiorari was expressly limited to that question (R. 149; 386 U.S. 907).

commodities of like grade and quality, * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them * * *.

* * * * *

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

* * * * *

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Section 5(a) of the Federal Trade Commission Act, as amended, 66 Stat. 632, 15 U.S.C. 45(a), provides in part as follows:

(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

* * * * *

(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

After extensive proceedings, the Federal Trade Commission found that respondent Fred Meyer, Inc., and two of its officers had (1) violated Section 2(f) of the Clayton Act by knowingly inducing certain suppliers of Meyer to grant it discriminatory prices illegal under Section 2(a) of the Act, and (2) violated Section 5 of the Federal Trade Commission Act by knowingly inducing certain suppliers to grant Meyer promotional allowances illegal under Section 2(d) of the Clayton Act; and entered a cease-and-desist order.

Meyer (hereinafter "respondent") operates a chain of retail stores in the Portland, Oregon, area selling groceries, drugs, variety items, and a limited line of clothing. With sales in some thirteen stores exceeding $40 million in 1957, it was, during the relevant period, the second largest seller of all goods in the area (R. 117, 42).

Since 1936, respondent has conducted, through the use of coupon books, a promotional advertising campaign for one month of each year. For each promotion, it prints and distributes a 72-page book, each page of which features a single product and serves as a coupon for the purchase of certain amounts of such products at a specially reduced rate. The campaign involves a large promotional venture: about 140,000 books were used in 1957, and about 120,000 in 1958

(R. 117–118, 44–45). Respondent finances the promotion by charging the supplier of each featured product a basic fee of $350. In addition, some of these suppliers give respondent price reductions based upon volume purchases, replace without charge goods that respondent has sold at special prices, or redeem coupons at an agreed rate (R. 118, 45–47).

The evidence considered in the Commission proceedings related to transactions between the respondent and five of its suppliers, four of which participated in the coupon-book program. The Commission found that the first $350 paid to respondent by each of the four participating suppliers was a promotional allowance within the meaning of Section 2(d), and that the additional benefits granted by these suppliers [2] in connection with the program were price concessions within the purview of Section 2(a). It found that both Sections 2(d) and 2(a) had been violated since these suppliers had not granted the same promotional allowances and price concessions to other buyers of the same products who resold them in the Portland area; and that Section 2(d) had also been violated by a fifth supplier's granting respondent promotional allowances, not connected with the coupon-book program, which were not available to two other buyers reselling in the same area (R. 120–128, 43–54).

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[2] In a subsequent, separate proceeding against one of these suppliers, the Commission found no injury to competition—a requisite for a Section 2(a) violation. It therefore did not rely in the court of appeals on the transactions between that supplier and respondent as part of its case relating to the price-discrimination charge against respondent (see R. 122, n. 5).

Some of the buyers disfavored by the suppliers were wholesalers who resold to retailers competing with respondent in selling to consumers. The Commission ruled that these disfavored wholesalers were, in the language of Section 2(d), "customers competing" with respondent "in the distribution of" the affected products, and were thus protected from discriminatory promotional allowances in favor of respondent, even though respondent was not a wholesaler but a direct-buying retailer (R. 60–66). The Commission further found that respondent and its officers knew or had reason to know that the promotional allowances and price concessions induced from and given by the suppliers were illegally discriminatory (R. 131–138, 74–98), and concluded that they had therefore violated Sections 5 and 2(f), respectively. The Commission's order specified that respondent could induce and receive only those price concessions and promotional allowances granted or offered to wholesalers reselling to respondent's retailer competitors, as well as to competing, direct-buying retailers (R. 115),[3]

[3] The order was in two parts. One part enjoined violations of Section 2(f) of the Robinson-Patman Act, and the other part enjoined violations of Section 5 of the Federal Trade Commission Act. The Section 2(f) part of the order enjoined respondent and its officers from inducing price discriminations between respondent and other customers of the same supplier where respondent is "competing with the purchaser paying the higher price or with a customer of the purchaser paying the higher price" (R. 115). The Section 5 part enjoined respondent and its officers from inducing any promotional allowance not offered to other customers of the same supplier competing with respondent, regardless of the functional level on which such competitors operate (*ibid.*; see note 4, *infra*, for the precise language used by the Commission in this part of its order).

The Court of Appeals for the Ninth Circuit upheld the Commission's findings that respondent and its officers had induced (1) price concessions which illegally discriminated against certain other retailer buyers and certain wholesaler buyers, and (2) promotional allowances which were illegal because they were not made available to direct-buying retailers competing with respondent. However, the court below reversed the Commission's ruling that respondent and its officers acted illegally in inducing promotional allowances that were not made available to wholesaler buyers who resell to retailers with whom respondent competes in sales to consumers (R. 124, 128, 130–131). Accordingly, it deleted that language of the Commission's order which would in effect prohibit respondent from inducing and receiving promotional allowances not granted to wholesalers reselling to respondent's retail competitors (R. 143, 146; see note 3, *supra*).[4] In so concluding, the court of appeals relied upon and followed its prior decision in *Tri-Valley Packing Ass'n* v. *Federal Trade Commission,*

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[4] In the Commission's order on the 2(d)–5 violation, respondent was enjoined from inducing and receiving promotional allowances unless the supplier made such allowances available "on proportionally equal terms to all of its other customers competing with [Meyer] in the sale and distribution of such supplier's products, including other customers who resell to purchasers who compete with [Meyer] in the resale of such supplier's products" (R. 115). As modified by the court of appeals, this part of the order more narrowly required respondent to cease and desist from inducing or receiving promotional allowances which were not made available by a supplier "on proportionally equal terms to all of its other customers competing with respondent Fred Meyer, Inc., in the sale of such supplier's products" (R. 146).

329 F. 2d 694, 709, in which it had held that Section 2(d) does not apply if the favored and the disfavored buyers compete on different "functional levels," *e.g.*, if one is a wholesaler and the other a retailer (see notes 13 and 21, *infra*).

SUMMARY OF ARGUMENT

"The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over small ones by virtue of their greater purchasing power." *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, 168. But the congressional concern in enacting the Act was not limited to the protection of small retailers; rather, the legislative purpose was to protect from discriminatory pricing and related practices the entire distribution system through which goods move from producer to consumer, which includes wholesalers as well as small retailers.

Considered in light of the Act's basic purpose, the Commission's interpretation of Section 2(d) is a reasonable and proper one. Large retailers tend to buy directly from suppliers whereas small retailers generally buy through wholesalers. Any promotional allowance made available to a direct-buying retailer like respondent, but not made available to a wholesaler who resells to retailers in competition with respondent, necessarily subjects the wholesaler-retailer distribution system to competitive disadvantage. Under Section 2(d), as construed by the Commission, the supplier would be required to make the promotional allowance available on proportionally equal terms to the wholesaler, who would then be

in a position to pass this benefit on to his retail outlets, or otherwise participate in the promotional venture, to the benefit of the entire, competing distribution system.

Giving the language of Section 2(d) its reasonable meaning in light of the underlying legislative purpose supports the Commission's view that that provision extends to competition at different "functional levels"—*i.e.*, wholesaler and retailer. That section bars promotional allowances not made available to "all other customers competing in the distribution of" the supplier's products. The wholesalers are "customers competing [with direct-buying retailers] in the distribution of" such products, because the wholesaler is part of the distribution system by means of which the supplier's goods reach the small retailer. Together, the wholesaler and his retail customers are a distribution network in competition with the direct-buying retailer.

The court of appeals' interpretation of Section 2(d), on the other hand, would lead to the anomalous result of prohibiting discrimination between two large direct-buying retailers, while allowing discrimination between a large direct-buying retailer and a competing wholesaler-retailer distribution system, whose need for statutory protection is far more compelling.

That interpretation would also create the further anomaly of permitting discriminatory promotional allowances where price discriminations are forbidden. Section 2(a) prohibits discriminatory pricing in favor of a direct-buying retailer against a wholesaler who

resells to retailers competing with the direct-buying retailer. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 55. It is clear that Congress intended Section 2(d) to prevent evasion of Section 2(a) through the use of promotional allowances instead of outright price concessions. Indeed, the absolute ban of the ancillary subsections of the Act, such as Section 2(d), was intended to force discriminatory practices into the form of price discriminations, cognizable under Section 2(a), since they are more easily detected than secret or hidden discriminations involving allowances or services. And the difference in language between Section 2(d) and Section 2(a) lends no support to the court of appeals' interpretation. If anything, that difference indicates that Congress intended the prohibition of Section 2(d) to be interpreted more broadly and its sanction applied even more stringently than that of Section 2(a).

Finally, none of the practical difficulties suggested as inherent in the Commission's interpretation provides sufficient reason for denying wholesalers and small retailers the protection of Section 2(d). Properly considered, against the background of the FTC Guides on Sections 2(d) and 2(e), promotional allowances given to wholesalers will be passed on to the small retailers or otherwise inure to the benefit of the wholesaler-retailer distribution system. Wholesalers will not be able to realize any "windfall" from having such allowances made available to them. No insuperable administrative burdens will be placed on supplier or wholesaler by the Commission's reading of Section 2(d). Under the Commission's flexible approach,

coupled with the statutory requirement of proportional equality, the policy goal of Congress in enacting Section 2(d) can be effectively achieved in a practicable, sensible way.

ARGUMENT

IN THE LIGHT OF THE BASIC CONGRESSIONAL PURPOSE IN ENACTING THE ROBINSON-PATMAN ACT, SECTION 2(d) SHOULD BE CONSTRUED AS PROHIBITING A SUPPLIER FROM GRANTING A PROMOTIONAL ALLOWANCE TO A RETAILER WHO BUYS DIRECTLY FROM THE SUPPLIER UNLESS THE SUPPLIER ALSO MAKES SUCH ALLOWANCE AVAILABLE ON PROPORTIONALLY EQUAL TERMS TO WHOLESALERS WHO RESELL TO RETAILERS COMPETING WITH THE DIRECT-BUYING RETAILER

Section 2(d) of the Robinson-Patman Act prohibits suppliers from giving promotional allowances to customers who distribute their products unless the allowances are made "available on proportionally equal terms to all other customers competing in the distribution of such products." [5] The suppliers in this case distributed their products through two different channels: 1) they sold directly to large retailers, such as respondent; and 2) they sold to wholesalers who, in turn, resold to other retailers. The Federal Trade Commission held that respondent violated Section 5 of the Federal Trade Commission Act by inducing these suppliers to grant it promotional allowances that

[5] Since the court below substantially upheld the Commission's decision and order with respect to 2(a)–2(f) part of the case (see *supra*, p. 7), and the sole question presented for review relates to the scope of Section 2(d), the discussion herein will be focused on the 2(d)–5 aspects of the case.

they did not grant to wholesalers who resold to retailers competing with respondent.[6] The court of appeals reversed the Commission, holding that the disfavored wholesalers were not customers "competing

[6] No serious question can be raised about the correctness of the court below's resolution, in the Commission's favor, of "the question whether the Commission may proceed against a buyer under § 5 of the Federal Trade Commission Act for inducing and receiving a discriminatory promotional allowance * * *", citing, *inter alia*, *Giant Foods, Inc.* v. *Federal Trade Commission*, 307 F. 2d 184 (C.A. D.C.), certiorari denied, 372 U.S. 910; *American News Co.* v. *Federal Trade Commission*, 300 F. 2d 104 (C.A. 2), certiorari denied, 371 U.S. 824; and *Grand Union Co.* v. *Federal Trade Commission*, 300 F. 2d 92 (C.A. 2) (R. 139). Noting that no case has rejected the result reached by those circuits, the court below indicated that it found "the reasoning of those cases persuasive, and adopt[ed] it" (*ibid.*).

Some ambiguity is presented by certain language used by the court below with respect to its holding on the Section 5 point, however, which implies that that provision, standing alone, reaches the inducing of discriminatory promotional allowances although competition at different functional levels is involved. As a preface to its holding that Section 5 is applicable to inducements of allowances in violation of Section 2(d), the court noted that such "a practice [was] not expressly declared unlawful, as to buyers, by the Robinson-Patman Act, nor to sellers where, as here, the discrimination is among purchasers at different functional levels of competition" (*ibid.*). Considered in context, however, that statement can hardly be read as indicating that the court concluded that Section 5 would apply even where Section 2(d), in its view, would not. All of the cases cited by the court hold only that Section 5 can be applied to the inducing buyer where there has been a violation of Section 2(d) by the supplier, all of the arguments made to the court below were predicated on this assumption, and the court's modification of the Commission's order by deleting the language compelling equality of treatment of wholesalers resolves any doubt about what was intended, despite the apparent breadth of that particular language.

[with respondent] in the distribution" of the suppliers' products. This ruling, we submit, is erroneous and, if allowed to stand, would create a serious loophole in the enforcement of the Robinson-Patman Act.

1. SECTION 2(d) SHOULD BE CONSTRUED BROADLY IN LIGHT OF THE BASIC PURPOSE OF THE ROBINSON-PATMAN ACT

"The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which larger buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, 168; see also *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 68–69.[7] In Section 2(d) of the Act Congress prohibited the practice of providing "large buyer customers" with "special allowances in purported payment of advertising and other sales-promotional services * * *"—a practice which Congress believed was a "favored medium for the granting of oppressive discriminations." H. Rep. No. 2287, 74th Cong., 2d Sess., pp. 15–16; S. Rep. No. 1502, 74th Cong., 2d Sess., p. 7. But the congressional concern in 1936 was not solely to protect the small retailer. Rather, the congressional focus was on the entire distribution system through which

[7] In *Simplicity Pattern* the Court pointed out that "[t]he Robinson-Patman amendments were enacted to eliminate * * * inequities" such as "advertising allowances" which were paid by the sellers to the large buyers in return for certain promotional services undertaken by the latter which, because they lacked "the purchasing power to demand comparable advantages," placed "the small independent stores * * * at a hopeless competitive disadvantage" (360 U.S. at 69).

goods move from producer to consumer, which, as the Commission noted in *Clairol, Inc.*, F.T.C. Dkt. No. 8647 (June 24, 1966), includes "the traditional wholesaler and his numerous small retailer-customers * * *" (see R. 61–62, for a similar statement). See also *Krug* v. *International Telephone & Telegraph Corp.*, 142 F. Supp. 230, 236 (D. N.J.). Indeed, much of the support for the enactment of the legislation came from representatives of wholesaler interests, speaking both for themselves and for their retailer customers.[8] And Congress used language in Section 2(d)—"all other customers competing in the distribution of such products"—peculiarly appropriate to accomplish this objective of protecting the whole distribution process against discriminatory practices by suppliers that favored large, direct-buying retailers.[9]

[8] The United States Wholesale Grocers' Association was a prime mover behind the Patman bill. The Association's representative during the House committee hearings, Mr. H. B. Teegarden, was a chief spokesman for the bill in tandem with Congressman Patman. In Congressman Patman's words, "Mr. Teegarden wrote this bill." Hearings before the House Committee on the Judiciary on H.R. 8442, H.R. 4995, H.R. 5062, 74th Cong., 1st Sess., ser. 15, p. 9 (1935); see Rowe, *Price Discrimination under the Robinson-Patman Act*, 367 (1962) [hereinafter "Rowe"]. In addition, it is our understanding that leave to file an *amicus* brief supporting the Commission's construction of Section 2(d) will be sought in the instant case by a wholesaler group, Atlantic Coast Independent Distributors Association, Inc.

[9] See R. 60–66, for the Commission's discussion of this point, in which it relied upon the fact that "the statute speaks of competition in the 'distribution' of the products, not merely of competition in their 'resale'" (R. 63), and which it concluded by relying upon "the very terms of the provision in question," saying that the wholesalers, "insofar as they resell to independent retailers sitting alongside [Meyer's] thirteen Portland super-

Considered in the light of this basic purpose, the Commission's interpretation of Section 2(d) is both reasonable and proper. Respondent, like many large retailers, buys directly from its suppliers; many of respondent's retailer competitors, like most small retailers, must buy through wholesalers. Any promotional allowance made available to respondent but not made available to the wholesaler necessarily subjects the interdependent wholesaler-retailer distribution system to competitive disadvantage. As the Commission noted, "if the wholesaler is denied promotional allowances received by respondents, it obviously cannot pass them on to its retailer-customers or use them for the benefit of those customers" (R. 64).[10] Under Section 2(d), as construed by the Commission, the supplier would be

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markets, are 'competing' with [Meyer] in the 'distribution' of the goods in question in every meaningful sense of those two terms" (R. 66).

[10] As the Commission noted, wholesalers who buy directly from the discriminating suppliers are "unquestionably 'customers' of those discriminators" (R. 63). It logically concluded that, "insofar as those wholesalers resell to retailers who, in turn, resell to consumers in competition with [Meyer], the wholesalers are competing with [Meyer] in the 'distribution' of the goods in question" (*ibid.*). In addition, the Commission pointed out that the small, independent retailers "depend entirely" on their wholesalers "for such competitive equality, vis-a-vis the direct-buying chains, as the independent retailers are able to secure. Any competitive disadvantage experienced by the wholesaler himself in buying goods in competition with the chains is necessarily passed on to its retailer-customers. If it pays more for a given product than [Meyer] pay[s], the price it charges the independent retailers will naturally reflect that higher price" (R. 63–64). Concluding on this point, the Commission stated that "[i]n such a market context * * * it ignores economic reality to say that [the] wholesalers are not 'competing' with [Meyer] in the 'distribution' of [the affected] products" (R. 64).

required to make the promotional allowance available to the wholesaler, on terms proportionally equal, as to the form of promotion and the nature and extent of benefits, to those of the arrangement with the direct-buying retailer. Compliance by the supplier would put the wholesaler in a position to pass the benefit on to his retail outlets, or otherwise participate in the promotional venture to the benefit of the entire, competing distribution system.[11]

Read in light of the congressional purpose, the language of Section 2(d) also supports the Commission's interpretation. The wholesalers are indeed "customers competing [with the direct-buying retailer] in the distribution" of the supplier's products because the wholesaler is part of the distribution system by means of which the supplier's goods reach the smaller retailer.[12] Together, the wholesaler and his re-

[11] Questions may be raised as to whether the Commission's approach can effectively ensure the accomplishment of the purposes underlying Section 2(d), and as to certain practical difficulties which might be thought to be inherent in that approach. See Commissioner Elman's dissenting opinion in the instant case (R. 103–106); see also Brief for Respondents in Opposition to Cross Petition, pp. 7–8. A full discussion of this matter is included at a later point (see *infra*, pp. 29–39).

[12] In *Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505, 524–525, the oil company argued that its retail customer was in reality a conduit for the gasoline sold by the oil company and that the oil company was thus in competition with its customer's retail competitors and, therefore, that the oil company could invoke the meeting competition defense of Section 2(b) when it lowered its price to its retail customer to enable him to meet a price charged by his retail competitors. The Court rejected that argument on the ground that it would so broaden the Section 2(b) defense as to render Section 2(a) ineffective (*id.* at 524–525). The statutory provisions and policy considerations involved in *Sun Oil* are obviously quite different

tail customers are a distribution network in competition with the direct-buying retailer. The mere fact that the direct-buying retailer does not buy through wholesalers does not remove it from competition with both the wholesaling and retailing parts of such a competing distribution network. Wholesalers serve as a necessary nexus between suppliers and retailers, and function as a conduit through which products reach the public, and without which efficient distribution would be uneconomic and difficult, if not impossible. As the Commission explained (R. 63):

> * * * It is true, of course, that only the retailer-customers of these two wholesalers com-

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from those here, and acceptance of the view of Section 2(d) here urged would have no effect on the viability of the *Sun Oil* decision. Indeed, in its opinion in the instant case the Commission referred to *Sun Oil* in noting that, "while 'competition' in one form or another is the concern of each of the several subsections of the Act, there is no universal definition of that term that can be applied mechanically to all of its provisions" (R. 64). In other words, the fact that "competition" as used in Section 2(b)'s meeting competition proviso refers solely to "primary-line competition," the Commission pointed out, "is not necessarily controlling in the context of another section" (*ibid.*). While Section 2(b)'s meeting competition defense is presumably applicable in Section 2(d) cases (see *Exquisite Form Brassiere, Inc.* v. *Federal Trade Commission*, 301 F. 2d 499, 503–506 (C.A.D.C.); Rowe, 416–420; FTC Guides, par. 14 (App., *infra*, p. 47); see also *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. at 67), the *Sun Oil* decision is wholly consistent with the view (developed *infra*, pp. 26–29) that Section 2(d) should be read at least as broadly as Section 2(a). *Sun Oil* was of course a 2(a) case in which the 2(b) meeting competition defense was restricted to primary-level competition (*i.e.*, at the seller level), although it had been previously established that 2(a) itself was not limited to price discriminations at the same functional level (see *infra*, p. 22); *Sun Oil* was decided against this background (see 371 U.S. at 527, n. 16).

pete with respondents in the direct resale of the goods to consumers. But the statute speaks of competition in the "distribution" of the products, not merely of competition in their "resale." These wholesalers, through their numerous retailer-customers, are seeking exactly the same *consumer dollars* that respondents are after. Every time an independent retailer loses a sale to respondents, the wholesaler who supplied that independent retailer suffers a loss of volume by just that much. And if all of the independent retailers in Portland should close their doors, these wholesalers would necessarily be finished in that market.

2. THE COURT OF APPEALS' NARROW READING OF SECTION 2(d) LEADS TO AN ANOMALOUS RESULT

The court of appeals' narrow reading of Section 2(d)—that it does not cover discriminatory promotional allowances where the disfavored wholesaler and the favored direct-buying retailer are not competing with each other on the same functional level, in the sense that they directly serve the same customers—disregards the principal purpose behind the enactment of the Robinson-Patman Act, and leads to an incongruous and anomalous result. According to that interpretation, Section 2(d) would forbid discrimination between two large direct-buying retailers, but would allow discrimination between a large direct-buying retailer and a competing wholesaler-retailer distribution system—even though the latter's need for the protection of the section is far more compelling.[13]

[13] In its opinion in *Tri-Valley Packing Ass'n*, which the court of appeals followed in the instant case (see *supra*, pp. 7–8), the Ninth Circuit had relied upon a prior Commission decision, *Atalanta Trading Corp.*, 53 F.T.C. 565, reversed on other grounds,

As the Commission stated in rejecting the interpretation later adopted by the court below (R. 87):

Atalanta Trading Corp. v. *Federal Trade Commission*, 258 F. 2d 365 (C.A. 2), as supporting the proposition that Section 2(d) applied only where there was competition at the same functional level, and concluded that a 2(d) violation could be shown only by reliance on the "indirect customer" doctrine (see note 23, *infra*), which it found inapposite (329 F. 2d at 709). However, the Commission hardly can be said to have squarely faced and definitively resolved this statutory interpretation question in *Atalanta*. Although in the hearing examiner's findings of fact, which were adopted by the Commission, there is a statement that "customers [which] were strictly wholesalers who resold to retailers * * * were therefore not in competition with [the direct-buying retailer inducing the allowances]" (53 F.T.C. at 566)); the Commission's order simply enjoined the supplier from granting allowances unless made available equally "to all other customers competing in the distribution or resale of such products" (*id.* at 573), and there was no specific discussion of this question in the Commission's opinion. Reliance by the Ninth Circuit could more appropriately have been placed on the Commission's decision in *Liggett & Myers Tobacco Co., Inc.*, 56 F.T.C. 221, where the Commission in fact faced and discussed the question whether Section 2(d) applies only to competition at the same functional level. Although holding that cigarette wholesalers and vending-machine operators do not compete in the distribution of cigarettes within the meaning of Section 2(d) (56 F.T.C. at 250–253), the Commission noted that it "hesitate[d] to adopt [a different] interpretation * * * without more convincing evidence" (*id.* at 252). Citing the absence of record support for a 2(d) violation under the circumstances, the Commission concluded by stating (*ibid.*): "There is no necessity, therefore, to decide whether a seller need make its promotional allowances available only to those of its customers who are operating at the same functional level." Commissioner Kern dissented, characterizing the Commission as having decided that Section 2(d) applied only to competition at the same functional level, and asserting that such a conclusion was unnecessary and unwise (*id.* at 253–257)).

But these two somewhat ambiguous decisions did not constitute the full background of Commission interpretation of the

* * * [I]n a geographical market served by, say, two direct-buying "chains," and one whole-

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reach of Section 2(d) against which the Ninth Circuit decided *Tri-Valley*. A full year prior to the decision in *Tri-Valley* the Commission had decided the instant case, in which it gave thorough consideration to the varying arguments as to the applicability of a functional-level test under Section 2(d) and concluded, after an extensive discussion, that the underlying policies of the Act required a broad reading of the scope of that section (see R. 60–66). In reaching this result, the Commission found it necessary to reject the conclusion reached in *Liggett & Myers*, and instead accepted the views stated in Commissioner Kern's dissenting opinion in that case and by the district court in *Krug* v. *International Telephone & Telegraph Corp.*, 142 F. Supp. 230, 236 (D.N.J.) (R. 66). Although the Commission's decision in this case was rendered in March 1963, and the Ninth Circuit's decision in *Tri-Valley* was not handed down until March 1964, there is no mention of or reference to that earlier decision in the court's opinion. This is in part explained by the fact that no question as to the scope of Section 2(d) was thought to be involved at the Commission level in that case, since the Commission viewed the case as involving customers competing on the same functional level (see *Tri-Valley Packing Ass'n*, 60 F.T.C. 1134, 1156). The Ninth Circuit disagreed, however, and concluded that different functional levels were involved as to some of the favored and disfavored customers, and thus found it necessary to reach the question which the Commission had not considered and had therefore not briefed or argued in the court of appeals.

Thus, the Commission's pre-*Fred Meyer* view of the scope of Section 2(d) was hardly a firmly fixed one. Certainly no definitive view was expressed in *Atalanta*, the only Commission decision cited by the Ninth Circuit in *Tri-Valley*, although the instant case had been decided by the Commission some twelve months earlier, and there the Commission had specifically focused on and resolved the 2(d) question. Nevertheless, despite the weak underpinnings of *Tri-Valley*, which were pointed out to the court below, that court determined not to reconsider its holding in *Tri-Valley* in the instant case (see note 21, *infra*). See generally Note, 35 Geo. Wash. L. Rev. 415, 416 (1966).

saler with 100 retailer-customers, a supplier who gave a promotional allowance to Chain A would not be required by Section 2(d) to give it to either the wholesaler or the 100 independent retailers who buy from it, but would have to give it to Chain B. This would mean, of course, that the protection of Section 2(d) is accorded to those who presumably have the market power to take care of themselves (competing "chains"), but denied to those who, as the instant record clearly shows, need its protection very badly indeed (R. 62).[14]

As a remedial statute directed toward certain abusive practices which, without statutory regulation, had developed, the Robinson-Patman Act should be construed against the background of the circumstances which led to its enactment. Under the result reached by the court below, however, the important public policy goal which that legislation was intended to serve is substantially ignored, insofar as Section 2(d) is concerned.

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[14] Moreover, when a retailer who buys through a wholesaler also has certain direct dealings with the supplier (such as having the supplier ship him products directly), the retailer is already protected under Section 2(d). See *Tri-Valley Packing Ass'n* v. *Federal Trade Commission*, 329 F. 2d 694, 709 (C.A. 9); *Kay Windsor Frocks, Inc.*, 51 F.T.C. 89, 95–96 (developing the "indirect purchaser" or "indirect customer" doctrine; see also note 23, *infra*). The Commission's interpretation of Section 2(d) here would merely extend its protection to situations where retailers buy through wholesalers and do not deal directly with the supplier in any way. See *American News Co.* v. *Federal Trade Commission*, 300 F. 2d 104, 109–110 (C.A. 2), certiorari denied, 371 U.S. 824.

Acceptance of the court of appeals' interpretation would also create a serious inconsistency within the Robinson-Patman Act itself. It has long been established that Section 2(a) of that Act (dealing with *price* discrimination) prohibits discriminatory price concessions in favor of a direct-buying retailer against a wholesaler who resells to retailers competing with the direct-buying retailer, despite the fact that they may be regarded as competing on different functional levels. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 55.[15] A discriminatory promotional allowance is but another form of price discrimination. To allow the latter while forbidding the former is quite anomalous—particularly when Congress made quite clear its intent to have Section 2(d) prevent evasion of Section 2(a)'s prohibition through the use of promotional allowances instead of outright price conces-

[15] In *Morton Salt* the Court considered and rejected a criticism that the Commission's order "bars respondent from selling to a retailer at a price lower than that charged a wholesaler whose customers compete with the retailer" (334 U.S. at 55). Noting that "Section 2(a) of the Act specifically authorizes the Commission to bar discriminatory prices which tend to lessen or injure competition with 'any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them'," the Court concluded that the language of that provision plainly supported the Commission's order (*ibid.*). *Morton Salt* has been consistently construed, by courts and commentators, as having definitively settled that Section 2(a) extends to competition at different functional levels. See, *e.g.*, *Tri-Valley Packing Ass'n* v. *Federal Trade Commission*, 329 F. 2d 694, 697–698 (C.A. 9); *Krug* v. *International Telephone & Telegraph Corp.*, 142 F. Supp. 230, 235 (D.N.J.); Rowe, 175.

sions.[16] See 80 Cong. Rec. 6282, 9418 (remarks of Congressman Utterback, chairman of the Senate-House conferees, and Senator Logan, Senate manager of the bill); *Krug* v. *International Telephone & Telegraph Corp.*, 142 F. Supp. 230, 236 (D.N.J.); *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 68; Rowe, 365.[17]

Indeed, it seems plain that Congress intended, by the interrelationship of Section 2(a) and Sections

[16] In the instant case the Commission noted an attempt by respondent to evade the prohibition of Section 2(a) by claiming that the discriminatory price concessions were in reality promotional allowances and, thus, according to the interpretation of Section 2(d) later adopted by the court of appeals, not prohibited anywhere in the Act (R. 65–66). That contention was rejected by the Commission, and its determination in this regard was upheld by the court below, which concluded that the Commission properly characterized some aspects of the various transactions as price concessions and others as promotional allowances (R. 128–130).

[17] See also *P. Lorillard Co.* v. *Federal Trade Commission*, 267 F. 2d 439, 443 (C.A. 3), certiorari denied, 361 U.S. 923, where the court stated that the purpose of Section 2(d) "was to eliminate all discriminations under the guise of payments for advertising or promotional services, and Congress employed language that would cover any evasive methods"; *State Wholesale Grocers* v. *Great A.&P. Tea Co.*, 258 F. 2d 831, 837–839 (C.A. 7), certiorari denied *sub nom. General Foods Corp.* v. *State Wholesale Grocers*, 358 U.S. 947.

2(c),[18] 2(d) and 2(e),[19] to prevent circumvention of the general prohibitions of Section 2(a) by the use of alternatives for price concessions. As noted by the Court in *Simplicity Pattern,* 360 U.S. at 68, n. 12, "During the congressional debates on the bill, there were continual references to the subsection (c), (d) and (e) practices as 'secret' [or hidden] discrimina-

[18] See *Biddle Purchasing Co.* v. *Federal Trade Commission,* 96 F. 2d 687 (C.A. 2), certiorari denied, 305 U.S. 634, in which the court held that Section 2(c) of the Act (dealing with brokerage fees) was designed to prevent the circumvention of the prohibition of Section 2(a) by the use of discriminatory brokerage fees instead of outright price concessions. See also *Federal Trade Commission* v. *Henry Broch & Co.,* 363 U.S. 166, 169.

[19] It seems plain beyond doubt that Section 2(d) (allowances) and 2(e) (services or facilities) were intended as companion provisions, directed toward different aspects of the identical problem—seller discrimination among buyers on grounds other than price in connection with advertising or promotional programs. The latter applies where a supplier actually furnishes services or facilities, the former where money is provided to accomplish the same result. Such an approach to 2(d) and 2(e) was taken by both congressional committees, and had been the consistent view of the courts, the Commission, and the commentators. *E.g., Exquisite Form Brassiere, Inc.* v. *Federal Trade Commission,* 301 F. 2d 499, 502 (C.A.D.C.) Rowe, 390–391. Despite some differences in the language of the two subsections—this Court's admonition in *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U.S. 61, 65, that "precision of expression is not an outstanding characteristic of the Robinson-Patman Act * * *" should be kept in mind—it is only logical that 2(d) and 2(e) be construed as having the same scope. No case has definitively concluded that 2(e) is restricted to competition at the same functional level. Indeed, the cases seem to point in the opposite direction, and tend to support a similar reading of 2(e)'s scope as was given to 2(d) by the Commission in the instant case. In *Elizabeth Arden, Inc.* v. *Federal Trade Commission* 156 F. 2d 132 (C.A. 2), certiorari denied, 331 U.S. 806, the Second Circuit upheld a Commission order

tions." Since such practices are more difficult to perceive than outright price concessions, it was the congressional purpose in enacting those provisions to force sellers "to confine their discriminatory practices to price differentials, where they could be more readily detected * * *" (*id.* at 68). Promotional allowances are of course but an indirect, and more sophisticated, form of price discrimination. Congress could hardly have intended to sanction under Section 2(d) the very type of discrimination that it prohibited as a price concession under Section 2(a), if accomplished directly. Yet that is the plain effect of the court of appeals' construction of Section 2(d), for, while refusing to apply 2(d) to competition at different functional levels, it plainly recognized that 2(a) has consistently been so applied (R. 131, 135).[20]

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which related to competition at different functional levels—wholesaler and retailer—where the evidence showed that the seller "sold to retailers directly and also indirectly through wholesalers or jobbers" (156 F. 2d at 135). Although this holding may be regarded as simply involving an application of the "indirect purchaser" doctrine, Commissioner Elman, in his dissenting opinion in the instant case, read *Elizabeth Arden* as supporting, by analogy, a broad view of the scope of Section 2(d) (R. 104–105). It would indeed seem quite anomalous, considering the close relationship between Sections 2(d) and 2(e), if a seller could discriminate at different functional levels if he were giving allowances but not if the promotional or advertising program involved his furnishing of services or facilities. They are parallel provisions, and should be construed *in pari materia*. See *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. at 67–69.

[20] In its earlier decision in *Tri-Valley Packing Ass'n.*, relied on for its decision on the 2(d) point in the instant case, the Ninth Circuit explicity noted that 2(a) applies to price discrimination affecting competition at different functional levels (329 F. 2d at 697–698); see note 15, *supra*.

Admittedly, the language of Section 2(a) and Section 2(d) is not identical.[21] Section 2(a) prohibits discriminations in price "between different purchasers" when "the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly * * * or to injure * * *competition with any person who either grants or knowingly receives

[21] No explicit reliance was placed by the court below on this difference in language. Rather, the court simply stated that its decision in *Tri-Valley Packing Ass'n* "made it clear that competition at the same functional level must be shown" (R. 124), and that the question "whether a 2(d) violation may exist where the favored and nonfavored customer inhabit different functional levels, was settled in Meyer's favor" in that earlier case (R. 128). Declining to "reconsider" its decision in *Tri-Valley* "after so short a time," the court below rejected the arguments, *inter alia*, that "the result [in that case] was plainly contrary to the language of the Clayton Act and other than that intended by Congress when it passed the Robinson-Patman Act, and [that] the effect of the case was to immunize a practice intended to be stamped out by that legislation, specifically, the bringing to bear of the economic power of the chains upon suppliers to wring from them prices lower than smaller and less powerful unorganized retailers can extract" (R. 131). It stated that the issue as to the scope of Section 2(d) was "considered at length" in the earlier case, that the congressional intent "is not as clear" as the government asserts, and that "no concrete showing of any increase in abuse by large buyers of their inherent power" had been made (*ibid.*).

Nor was there any discussion of the difference in language between Sections 2(a) and 2(d) in the Ninth Circuit's opinion in *Tri-Valley*. There the court simply stated that "the underlying purpose of Section 2(d) * * * is to require sellers to deal fairly with their customers who are in competition with each other, by refraining from making allowances to one such customer unless making it available on proportionately equal terms to the others" (329 F. 2d at 708), and concluded that no violation of Section 2(d) was shown since the various wholesalers and retailers involved were not in "functional competition" (*id.* at 709–710).

the benefit of such discrimination, or with customers of either of them." Section 2(d) prohibits granting a "customer" a promotional allowance "unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products." But this difference in language does not justify the result reached by the court of appeals. It simply means that to attack successfully a practice under Section 2(a) the Commission must show 1) a discrimination (in price) and 2) certain anticompetitive effects; while to prevail under Section 2(d) it need only show a discrimination (in providing promotional allowances).[22] Thus, the difference in language demonstrates, if anything, that Congress wished the prohibition of Section 2(d) to be interpreted more *broadly,* not more narrowly, than

[22] As the Commission noted, while Section 2(a), unlike Section 2(d), "specifically describes the several levels of 'competition' to be protected (competition with the giver and the receiver of the lower price, 'or with customers of either of them'), that description sets forth not the elements of a price discrimination—which 'is merely a price difference', *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960)—but the 'effects' that must appear before the 'discrimination' will be deemed harmful enough to warrant the laying on of the laws [sic] restraining hand. Hence that language, although it supported the Court's conclusion in *Morton Salt*, *supra*, that the 'difference' between the price charged the favored retailer and the nonfavored wholesalers amounted to a price 'discrimination', was not essential to it. The same result would doubtless have been reached if the draftsmen of Section 2(a), while retaining its present description of the offense of 'discrimination', i.e., 'discriminate in price between different purchasers', had made it a per se provision like Section 2(d) and thus omited completely all reference to the three levels of competition at which injury can occur" (R. 64–65).

that contained in Section 2(a), and that its sanction be more *stringently,* not more *leniently* applied (cf. remarks of Congressman Utterback, 80 Cong. Rec. 9418).

Indeed, as noted earlier (*supra,* pp. 23–25), the essential purpose behind making the prohibitions of the ancillary subsections—2(c), 2(d), and 2(e)—sweepingly absolute in nature and the violations thereof *per se* ones was to drive discriminatory practices into the form of direct discriminations based on price, cognizable under Section 2(a), thus making them easier to identify and prevent. Consistent with this purpose, and with the difference in language between 2(a) and 2(d), Section 2(d) should be applied to every discrimination between customers actually competing in the "distribution" of the affected products, without regard to the functional levels at which such customers operate.[23]

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[23] Respondent contends that the Ninth Circuit's reversal rests also on the separate ground that the Commission had failed to show that the supplier's products could be traced to the shelves of any of the wholesaler's retail customers who were in competition with respondent. Brief for Respondents in Opposition to Cross Petition, pp. 8–9. Although there is some confusing language in the opinion to support this construction (R. 124–125), upon closer inspection it is clear that the court meant only that, since the products could not be traced, the retailers were not entitled to the protection of Section 2(d) as "indirect customers" of the supplier (R. 124–125). According to the "indirect customer" doctrine, a retailer buying from a wholesaler but having direct contacts with the supplier is a "customer" of the supplier within the meaning of the word in Section 2(d). *Tri-Valley Packing Ass'n* v. *Federal Trade Commission,* 329 F. 2d 694, 708–710 (C.A. 9); see generally Rowe, 398–399. The court seems to have read its own opinion in *Tri-*

3. UNDER THE COMMISSION'S CONSTRUCTION, SECTION 2(d) CAN BE EFFECTIVELY APPLIED, IN A PRACTICABLE MANNER, TO ACCOMPLISH THE STATUTORY PURPOSE

Respondent has urged (Brief in Opposition to Cross Petition, No. 789, 1966 Term, pp. 7–8) that the Commission's construction will lead to certain practical difficulties. Based upon the mistaken assumption that only the wholesaler's retailer customers are intended to receive the allowances, participate in the promotional program, and derive the benefit therefrom, respondent argues that the Commission's construction, instead of preventing a competitive disadvantage, would "really result in a windfall to the wholesaler," who cannot be compelled to pass the allowances on to his retailer customers.[24] Respondent also points out

Valley as holding that tracing was necessary to establish the "indirect customer" relationship (see 329 F. 2d at 708).

In any event, it is clear that the court below did not intend to upset the Commission's finding of the necessary competitive relationships between respondent and the retailers buying from the wholesalers. Nowhere does the court attack the Commission's carefully reasoned conclusion that there was a high probability that a substantial proportion of the suppliers' products reached the shelves of retailers buying through the wholesalers and competing with respondent (R. 66–68). Moreover, the court reversed only the Commission's holding that the suppliers had violated Section 2(d) (R. 130–131): Had the court found no competitive relationship between the wholesaler's retailer customers and respondent, it would have been bound to overturn as well the Commission's holding that these suppliers had violated Section 2(a).

[24] Commissioner Elman's dissent was based on the fact that the Commission's order does not require the wholesaler to pass on the allowances to his retailer customers (R. 104). He would have required the suppliers to bypass their customers, the wholesalers, and make the allowances available directly to the wholesaler's retailer customers who compete with respondent in the sale of the products to consumers (R. 104–106).

that Section 2(d) requires only that the allowances be made "available" to competing customers, and asserts that the wholesaler may determine not to accept such allowances, though offered, since if he does he would have the burden of properly administering the promotional program, which in some cases would include correctly apportioning the allowances among his retailer customers and ensuring that the allowances are used for the intended purpose.[25]

Reading the Commission's opinion against the background of the Act, taken as a whole, and, more particularly, the Commission's policy position on Section 2(d), as stated in its publicly promulgated Guides for Advertising Allowances and Other Merchandising Payments and Services,[26] it is quite clear that the

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[25] A supplier has the duty under Section 2(d) to distribute allowances "on proportionally equal terms" to his competing customers and has the further duty to make sure that the allowances are used for promotional purposes. *General Foods Corp.*, 52 F.T.C. 798, 823. An inducing, direct-buying retailer, and perhaps even a noninducing retailer who simply receives allowances from a supplier, would have a similar duty in this regard, although the steps required to be taken to satisfy that obligation might differ significantly depending on the role the retailer plays in the particular promotional program. See, *e.g.*, *Grand Union Co.* v. *Federal Trade Commission*, 300 F. 2d 92, 100 (C.A. 2). It would seem that an inducing, direct-buying retailer, such as respondent, who conceived of and initiated the entire program, might have as high a duty as the supplier himself to ensure proportionality and proper use of the allowances. That, of course, is not a question that need be resolved in the instant case. See generally FTC Guides, pars. 7, 11 (App., *infra*, pp. 43–44, 45–46); see also Rowe, 409–411.

[26] These FTC Guides, relating to compliance with Sections 2(d) and 2(e) of the Act, were adopted by the Commission on May 19, 1960, and are set out in 1 CCH Trade Reg. Rep. 6073–6079. They are based both on decisions of the courts and

Commission's approach is not properly subject to such criticisms.

In the first place, respondent erroneously assumes that Section 2(d) is satisfied only if the allowances are in every case passed on from the wholesaler to the retailer customers. That would be proper and appropriate in some instances, such as where the direct-buying retailer is given an allowance upon the condition that it perform an in-store promotion. In that case, proportional equality would be achieved by offering a similar allowance to the wholesaler upon terms requiring him to pass on an appropriate share to those of his retailer customers who will in return perform similar in-store promotions. But, in other instances, an offer limited to such an arrangement would not be appropriate, such as where the direct-buying retailer is given an allowance for advertising the avail-

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the Commission, and on the practice of the Commission in applying the requirements of Sections 2(d) and 2(e). These guides were originally developed for internal use, but were published by the Commission in 1960 and are publicly available to all interested persons. As stated in the Commission's regulations, these guides "are administrative interpretations of laws administered by the Commission for the use of the Commission's staff and guidance of businessmen in evaluating certain types of practices" (16 C.F.R. §§ 1.55–1.56). Although never reprinted in the Federal Register nor formally adopted by the Commission as rules, these guides authoritatively embody Commission practice, have been included in trade regulation manuals, and have been cited and relied upon by lower courts and commentators (see generally Rowe, 363 *et seq.*). It is thus a fair assumption that the Commission's opinion was written against the background of these published and publicly available guides. They are referred to herein as "FTC Guides", and, for convenience, are set out, in pertinent part, in the Appendix (pp. 41–48), as modified on January 31, 1967.

ability in its stores of products purchased from the supplier. In that situation, proportional equality might best be achieved by offering a similar allowance to the wholesaler upon terms requiring him to publish similar advertisements of the availability of the supplier's products in his retailer customers' stores.

Thus, although in most cases a supplier would probably desire to deal with and through a wholesaler rather than directly with the latter's retailer customers—who might be many in number and whom the supplier might not know or have any contact with—there may be situations in which it would be more feasible for the supplier to deal directly with the retailer customers rather than through the wholesaler in regard to a promotional program. Under the Commission's approach, that sort of arrangement would be permissible, so long as it was satisfactory with the particular wholesaler involved.[27] Under Commissioner Elman's suggested approach (see note 24, *supra;* R. 103–106), however, the wholesaler would be wholly bypassed, and the supplier's duty would be only to the individual, independent retailers in each case.[28] Such a bypassing of the wholesaler in each and every situation seems both unnecessary and impracticable. There are numerous kinds of promotional programs in which the wholesaler will be quite directly interested, in

[27] Indeed, Rowe suggests this method of proceeding as an alternative to making allowances directly available to the wholesaler. See Rowe, 90 (1964 Supp.).

[28] Commissioner Elman's solution for the inadequacy he found in the Commission's order was to read "customers" as including the wholesaler's retailer customers, and to require that allowances be made available to them, rather than to the wholesaler (R. 105–106).

which the supplier will desire to work through the wholesaler rather than deal with the wholesaler's many retail outlets, and in which such an arrangement would plainly be the more feasible way of proceeding. Commissioner Elman's view would foreclose this approach; the Commission's interpretation would not. Construing Section 2(d) in a manner which will allow such flexibility is desirable.

Allowances for promotional purposes are required to be given in a form which ensures their use for the purposes intended, and must be made available to all competing customers on proportionally equal terms (see note 25, *supra*). A supplier who simply makes an amount of money generally available to a wholesaler, in order to discharge his obligation under Section 2(d), would probably not be in sufficient compliance with that provision. As the FTC Guides make clear, a supplier engaged in a promotional program must do so under a plan which meets several requirements (FTC Guides, par. 6, App., *infra*, pp. 42–43). That plan must allow all types of competing customers to participate or provide some effective alternative for participation by those customers not in a position to use the basic plan (FTC Guides, par. 9, App., *infra*, pp. 44–45). An obligation rests on both supplier and customer to see that the promotional allowances provided are actually used in full solely for the intended purposes (FTC Guides, par. 11, App., *infra*, pp. 45–46). Apart from these requirements, which serve to ensure that the allowances are properly utilized, it will of course be in the supplier's interest to supervise the use of promotional allowances which are provided to whole-

salers, once it is clear that that is required by Section 2(d). Indeed, the very idea of such a program is to promote the supplier's products through an advertising scheme which will have the effect of increasing sales of the featured products to consumers.

In no event could a wholesaler lawfully retain as a "windfall" allowances provided to him by a supplier in connection with a promotional program. If such allowances are in fact pocketed by the wholesaler, without complying with the terms and conditions upon which they were granted, the *wholesaler's* action in this respect would plainly not satisfy the requirements of Section 2(d), even though the *supplier* has adequately discharged all of his statutory obligations. In such a situation, the wholesaler's acceptance and retention of such allowances could be attacked as a violation of Section 2(f) of the Act (see FTC Guides, par. 11, App., *infra,* p. 46), or, depending on the circumstances, Section 5 of the Federal Trade Commission Act.

Section 2(d) of course requires only that allowances be made "available" to customers competing in the distribution of the supplier's products. Under the Commission's construction of that section, in situations like the one here presented, the wholesaler is regarded as the "customer" competing with the direct-buying retailer. An allowance would therefore, at least initially,[29] be made available to the wholesaler, and it

[29] Conceivably, when so approached, the wholesaler may indicate to the supplier that, while desirous of having his retailer customers participate in and benefit from the proposed program, he would prefer for the supplier to deal directly with the retailers. No problem would be presented if the supplier

is within that wholesaler's power to reject it. Should this happen, it might be thought, the other intended beneficiaries of the policy underlying 2(d)—the retailer customers—would be denied participation in the promotional program without being able to decide this for themselves. Such a problem seems quite theoretical, however.

In the first place, most wholesalers will probably welcome the opportunity to participate in such a program, for it will inure to their benefit as well as that of their retailer customers—if successful, the promotion will increase the wholesaler's sales to these customers. Most wholesalers, therefore, wanting to encourage promotion of their retailer customers' products, will in all likelihood accept any worthwhile offer and see that the allowance is properly used. And if the administrative problems incident to wholesaler participation are so great as to deter a wholesaler from participation, it may well be that the offer of participation made to the wholesaler is not one made on "proportionally equal" terms. As the FTC Guides and the supporting cases make clear, the requirement that allowances be made available on proportionally equal terms places an obligation on the supplier to ensure that reasonable and feasible alternatives for participation are made available to those customers who, because of their size or nature of operation, cannot participate directly in the basic promotional plan

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chose to do so (see note 27, *supra*); if he did not, then a question would be raised as to whether the wholesaler's reluctance to participate was because the allowances were not offered by the supplier on proportionally equal terms (see the discussion *infra*, pp. 35–36).

as originally devised. Where a wholesaler determines that participation is not practicable, because the offer does not in fact provide such alternatives, the supplier's action would of course not comport with the statutory command.[30]

Nor would the burdens incident to administering participation in a promotional program appear to be generally overwhelming or insuperable for the wholesaler. Such burdens may in large measure be frequently assumed by the supplier. And whatever burdens may fall upon the wholesaler will of course be offset and compensated for by the benefits which will flow from participation in such collective and cooperative promotional endeavors. In addition, implementation of and adherence to the flexible statutory requirement of proportional equality will probably go far to overcome any wholesaler resistance to partici-

[30] Although not passing on the question, the Court in *Simplicity Pattern* noted that "the Commission has indicated a willingness to give a relatively broad scope to the standard of proportional equality under §§ 2(d) and 2(e)," citing and quoting from *Lever Bros. Co.*, 50 F.T.C. 494, 512 (360 U.S. at 61–62, n. 4). In so noting the Commission's approach in this regard, the Court at least implicitly indicated its agreement with the Commission, since the Court approvingly referred to a good faith "tailoring of services and facilities to meet the differing needs of two classes of customers * * *" as constituting the offering of benefits on proportionally equal terms (*ibid.*), there in a 2(e) context. See generally Rowe, 399–414, and, more particularly, *id.* at 403–404.

pation in such programs because of the attendant administrative burdens.[31]

Apart from these considerations, and assuming that nevertheless there may be situations in which a wholesaler would still decline to accept an offer to participate in a promotional program—although in his interest to do so and the offer is one properly made on proportionally equal terms—the presence of his wholesaler competitors, who might not be as reluctant to participate, will probably make his refusal one as to which he will promptly have some second thoughts. In other words, if his retailer customers start to turn to other wholesalers who are in a position to offer participation in a particular supplier's promotional

[31] In addition to the points already considered, respondent also suggests, as pertinent to an evaluation of the practicality of the Commission's construction of Section 2(d), the difficulty in ascertaining which retailer customers of a wholesaler actually receive a particular supplier's products when such goods have been commingled by the wholesaler with those obtained from other suppliers. But the same sort of difficulty exists when price concessions, rather than promotional allowances, are involved. Yet it is clear that, under Section 2(a) and the cases construing and applying that provision, the supplier must nevertheless price without discrimination in such a situation. See, *e.g.*, *Tri-Valley Packing Ass'n* v. *Federal Trade Commission*, 329 F. 2d 694, 698 (C.A. 9); *Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F. 2d 43, 49–50 (C.A. 8), affirmed, 355 U.S. 411; cf. *Currin* v. *Wallace*, 306 U.S. 1, 11. Such a supposed problem can arise only where the products involved are so identical as to be essentially fungible. As under Section 2(a), the wholesaler's stock of such goods would be treated as being fungible in nature, and the particular supplier's products would be traced only so far as that stock. Retailer customers buying from that stock and selling to consumers in direct competition with a direct-buying retailer such as respondent would be eligible for and entitled to receive any allowances which are to be passed on by that wholesaler.

program as a valuable incident to their purchase of certain products, the reluctant wholesaler will be likely to reconsider.

In any event, these considerations properly relate to "hypothetical situations" which may or may not arise in complying with the Act and with Commission orders. Cf. *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 431. If they do arise, the Commission's rules make available procedures under which binding advisory opinions may be obtained as to whether particular programs properly comport with Section 2(d)'s requirements. 16 C.F.R. §§ 1.51–1.54, 3.26(b), (c).[32] Suppliers and wholesalers concerned about the extent of their obligations under Section 2(d) or the administrative burdens of supervising such a program can plainly turn to the Commission for assistance in this regard, as can the wholesaler unsure whether a particular offer is in fact one made on proportionally equal terms. Cf. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394.

As the foregoing discussion makes clear, the concern expressed by Commissioner Elman and the points raised by respondent can all be satisfactorily answered by a consideration of the Commission's practice and policy in administering Section 2(d) and in monitoring compliance with its orders. In any event, none of the alleged difficulties provides sufficient reason for denying to small, independent re-

[32] Under the FTC Procedures and Rules of Practice, an advisory opinion on the legality of any "proposed course of action" which a person seeks to pursue may be obtained from the Commission (16 C.F.R. §§ 1.51–1.52).

tailers and their wholesalers what protection Section 2(d) can afford. That, properly considered, is what the Commission's decision in the instant case attempts to accomplish.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed insofar as it holds that respondent's suppliers did not violate Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, by granting respondent promotional allowances not made proportionally available to wholesalers who resold to respondent's retail competitors, and the case should be remanded with instructions to restore that language in the Commission's order which would prohibit respondent from inducing and receiving promotional allowances not made available to wholesalers reselling to respondent's retail competitors.

Respectfully submitted.

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APPENDIX

GUIDES FOR ADVERTISING ALLOWANCES AND OTHER MERCHANDISING PAYMENTS AND SERVICES; COMPLIANCE WITH SECTIONS 2(d) AND 2(e) OF THE CLAYTON ACT, AS AMENDED BY THE ROBINSON-PATMAN ACT

* * * * *

1. *When does the law apply?* Sections 2 (d) and (e) apply to a seller of products in interstate commerce, if he either (a) pays for services or facilities furnished by his customers in connection with the distribution of his products [Section 2(d)], or (b) furnishes such services or facilities to his customers [Section 2(e)].

2. *Who is a seller?* "Seller" includes anyone who sells products for resale, with or without further processing. Selling corn syrup to a candy manufacturer is an example of a sale for resale with processing.

3. *Who is a customer?* A "customer" is someone who buys directly from the seller or his agent or broker. Sometimes someone who buys from the customer may have such a relationship with the seller that the law also makes him a customer of the seller. In these Guides, the word "customer" which is used in Section 2(d) of the law includes "purchaser" which is used in Section 2(e).

4. *What is interstate commerce?* This is something that whole law books have been written about; you cannot define it in a few words. Legal decisions tend to interpret the term quite broadly. If there is any part of a business which is not wholly within one

state, (for example, sales or deliveries of products, their subsequent distribution or purchases or deliveries of supplies or raw materials), the business may be subject to the Robinson-Patman Act. Sales in the District of Columbia are also covered by the law.

5. *What are services or facilities?* This term has not been exactly defined by the statute or in decisions. The following are merely examples—the law also covers other services and facilities.

(a) The following have been held to be services or facilities covered by the law where the seller has paid the buyer for furnishing them: Any kind of advertising, handbills, window and floor displays, special sales or promotional efforts for which "push money" is paid to clerks, salesmen, and other employees of the customers, demonstrators and demonstrations, collecting of orders from individual stores, furnishing complete distribution of seller's line.

(b) Here are some examples that have been held to be services or facilities covered by the law when the seller furnished them to a customer: Any kind of advertising, catalogs, demonstrators, display and storage cabinets, display materials, special packaging, or package sizes, warehouse facilities, accepting returns for credit, prizes or merchandise for conducting promotional contests.

In these Guides, the term "services" is often used as short for "services and facilities."

6. *Need for a plan.* If a seller makes payments or furnishes services that come under these sections, he must do it under a plan that meets several requirements. Although this plan need not be written or formal, this may be advisable, particularly if there are many competing customers to be considered or if the plan is at all complex.

Briefly, the requirements are:

(a) The payments or services under the plan must be available on a proportionally equal basis to all competing customers. (See paragraph 7)

(b) The seller should take some action to inform all of his customers who compete with any participating customer that the promotion is available. (See paragraph 8)

(c) The plan must either allow all types of competing customers to participate or provide some other means of participation for those who cannot use the basic plan. (See paragraph 9)

(d) The seller and customer should have a clear understanding about the exact terms of the offer and the conditions upon which payments will be made for services and facilities furnished. (See paragraph 10)

(e) The seller must take reasonable precautions to see that the services are actually furnished and also that he is not overpaying for them. (See paragraph 11)

7. *Proportionally equal terms.* The payment or services under the plan must be made available to competing customers on proportionally equal terms. This means that payments or services must be proportionalized on some basis that is fair to all customers who compete. No single way to proportionalize is prescribed by law. Any method that treats competing customers on proportionally equal terms may be used. Generally, this can best be done by basing the payments made or the services furnished on the dollar volume or on the quantity of goods purchased during a specified time.

Example: A seller may properly offer to pay a specified part (say 50%) of the cost of local newspaper advertising up to an amount equal to a set percentage (such as 5%) of the dollar volume of purchases during a specified time.

Example: A seller may properly place in reserve a specified amount of money for each unit purchased, and use it to reimburse customers for newspaper advertising when they prove they have advertised.

Example: A seller may not select one or a few customers to receive special allowances to promote his product, because of their special reputation, without making those allowances available on proportionally equal terms to other customers who compete with them.

Example: A seller's plan may not provide an allowance on a basis that has rates graduated with the amount of goods purchased, as, for instance, 1% of the first $1,000 purchases per month, 2% of second $1,000 per month, and 3% of all over that.

8. *Seller's duty to inform.* The seller should take some action to inform all his customers competing with any participating customer that the plan is available. He can do this by any means he chooses, including letter, telegram, notice on invoices, salesmen, brokers, etc. However, if a seller wants to be able to show later that he did make an offer to a certain customer, he is in a better position to do so if he made it in writing.

9. *Covering all competing customers.* The plan must allow all types of competing customers to participate. It must not be tailored to satisfy the needs of a favored customer or class, but must be suitable and usable under reasonable terms by all competing customers. This may require offering all customers more than one way to participate in the plan. The seller cannot either expressly, or by the way the plan operates, eliminate some competing customers. Where the seller has alternative promotional plans, his customers must be given the opportunity to choose among the plans.

Example: S offers a plan for cooperative advertising on radio, television or in a newspaper. Some of his customers who compete with those who receive the allowance are too small to use the offer. He must offer them some usable and proportional alternative, such as advertising in a neighborhood paper, handbills, etc. (See Guide 7)

Example: The seller's plan provides for furnishing demonstrators to large department store customers. He must provide usable alternatives to his customers who run other types of stores and compete with these customers but cannot use demonstrators. The alternatives might be services of equivalent value that the competing customers could use, or payments of like value for advertising or displays furnished by the customers. (See, also, Guide 7)

Example: A seller of appliances makes his plan available only to those customers purchasing at least some minimum number (such as eight) of his appliances in a single order or a stated period. If this requirement is beyond the reach of some customers competing with those participating in the promotion, it may be illegal.

Example: A seller should not refuse advertising allowances to those who advertise the seller's products at prices below a given figure, where this may be a means of fixing prices illegally.

10. *Need to understand terms.* There should be a clear understanding between the seller and each participating customer as to the exact terms of the offer and the conditions upon which payments will be made for service and facilities furnished.

11. *Checking customer's use of payments.* The seller must take reasonable precautions to see that the services he is paying for are furnished and also that he is not overpaying for them. Moreover, the

customer must expend the value received in full solely for the purpose for which the allowances were given. If the seller knows or should know that what he pays or furnishes is not being properly used, the payments or services must be discontinued. It should be noted that payments by the seller where the customer performs no services may result in legal action against the seller under Section 2(a) of the Robinson-Patman Act and against the customer under Section 2(f) of that law. Likewise, a seller may not properly pay, nor may a customer properly receive and retain, any amount in excess of that actually used by the customer to perform the service.

12. *Competing customers.* The seller is required to provide in his plan only for those customers who compete in the distribution of the promoted product with the customer who is participating in the promotion. Therefore, the seller can limit the area of his promotion to that in which participating customers sell.

Example: Manufacturer A, located in Wisconsin and distributing shoes nationally, sells shoes to three retailers who sell only in Roanoke, Virginia, and compete with each other there. He has no other customers selling in Roanoke or its vicinity. If he offers his promotion to one Roanoke customer he must include all three, but can limit it to them.

Example: Manufacturer A distributes his products nationally. He may lawfully engage in a special promotional campaign in the New England states without making the same program available to customers in the remainder of the country who do not compete with New England customers.

Note: The seller must be careful here not to discriminate against customers located on the fringes but outside the area selected for the special promotion,

since they may be actually competing with those participating.

13. *Indirect payments.* Promotional assistance plans are sometimes devised and/or administered by third parties who are neither suppliers nor customers. The fact that a promotional assistance plan is thus devised and/or administered in no way insulates suppliers or customers from the requirements of the statute. Furthermore, the third party or intermediary may himself be liable if the use or administration of the plan results in violation of the law.

Example: A seller may not buy advertising time from a radio station that is furnishing free radio time to certain favored customers of the seller because the customers run an in-store promotion of the seller's goods.

Sellers or intermediaries contemplating the use of such tri-partite promotional plans may obtain an advisory opinion concerning the legality of a specific, proposed plan by submitting a request, together with complete details of the proposed plan, to the Secretary, Federal Trade Commission, Washington, D.C. 20580. Assistance with respect to existing plans may be obtained by writing to the Commission's Bureau of Industry Guidance.

14. *Meeting competition in good faith.* A seller charged with discrimination in violation of Section 2(d) or Section 2(e) may defend his actions by showing that the payments were made or the services were furnished in good faith to meet equally high payments or equivalent services paid or furnished by a competitor. However, this is a very technical defense subject to important limitations.

15. *Cost justification.* It is no defense to a charge of unlawful discrimination in the payment of an allowance or the furnishing of a service for a seller to

show that such payment, service, or facility, could be justified through savings in the cost of manufacture, sale or delivery.

16. *Customer's liability.* Sections 2 (d) and (e) apply only to sellers and not to customers. However, a customer who knows or has reason to know that he is receiving payment or service granted or furnished when the seller violates Sections 2 (d) or (e) may also be proceeded against by the Commission under Section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition.

Example: Buyer "A" actively solicits his suppliers to purchase advertising in connection with an anniversary sale or new store opening knowing or having reason to believe that such payments are not made under the seller's regular cooperative advertising program and that they are not offered to competing customers.

U.S. GOVERNMENT PRINTING OFFICE: 1967

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 27

FEDERAL TRADE COMMISSION, *Petitioner*

v.

FRED MEYER, INC., ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' OPPOSITION TO MOTION OF ATLANTIC COAST INDEPENDENT DISTRIBUTORS ASSOCIATION, INC. FOR LEAVE TO FILE A BRIEF AMICUS CURIAE

Respondents Fred Meyer, Inc., Fred G. Meyer and Earle A. Chiles oppose the motion of the Atlantic Coast Independent Distributors Association, Inc. (ACIDA) for leave to file a brief *amicus curiae* on the

grounds that the interest of ACIDA lies not in the resolution of the issue before this Court but in the voicing of an essentially private controversy which has no bearing on that issue. The role of an *amicus curiae,* as we understand it, is a limited one. He is required to deal with the issue that is pending before the Court. Instead of doing this, ACIDA seeks to present facts and arguments arising in an entirely different controversy and involving separate and different issues.

Also, to the extent there may be any application of the holding of the court of appeals to the business of the ACIDA members (which we are unable to observe), there is no reason to believe the Solicitor General's Office will fail or be unable adequately to present the facts or questions of law to this Court. ACIDA does not contend otherwise.

The *sole* issue before this Court is whether Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(d), requires a supplier to make promotional payments available on proportionally equal terms to customers operating at different functional levels, i.e., to wholesale and retail customers. This narrow issue involves *only* Section 2(d); no other subsection of the Robinson-Patman Act is in any way involved. It is evident, however, that ACIDA's controversy with the periodical and paperback suppliers does not concern Section 2(d) at all but is founded in Section 2(a) of the Act.

Section 2(d) prohibits a seller from making payments to a customer "as compensation or in consideration for any services or facilities furnished by or

through such customer in connection with the processing, handling, sale or offering for sale" of the seller's goods "unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution" of such goods. It is settled that the prohibition of this section is against the payment of money, or other consideration, as compensation for *promotional* or *advertising* services rendered by the customer in connection with the customer's *resale* activities. See Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962), at 107, 370-372, 376-381, and cases there cited. A payment made by a supplier, or the furnishing of such services by a supplier as are the subject of ACIDA's complaint, in connection with the *original sale* of the supplier's goods, rather than in connection with the *resale* of those goods by the customer, is, on the other hand, cognizable only under Section 2(a) of the Act as a discrimination in price (*Id.* at 103-105, 107, 376-381).[1]

It is thus evident that what ACIDA really asks this Court to consider is whether the specific practice complained of results in an unlawful *price* discrimination against its wholesaler-members. This controversy is not before the Court in the instant case.

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[1] The alleged discriminatory services furnished by the periodical and paperback suppliers consist of extension of credit terms, maintaining and placing current materials in customer outlets, and processing returns of unsold merchandise. These services are clearly not furnished "as compensation or in consideration" for the furnishing by customers of other services in connection with the customers' resale function; no *quid pro quo* whatsoever passes from the customer to the supplier as is required under Section 2(d).

CONCLUSION

The motion of Atlantic Coast Independent Distributors Association, Inc. for leave to file a brief *amicus curiae* should be denied.

Respectfully submitted,

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September 13, 1967

SUPREME COURT, U. S.

SEP 23 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 27

FEDERAL TRADE COMMISSION,

Petitioner,

—v.—

FRED MEYER, INC., *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR CLAIROL INCORPORATED, AS *AMICUS CURIAE*

WEIL AND LEE,
Attorneys for Clairol Incorporated, as amicus curiae.

GILBERT H. WEIL,
of counsel.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR CLAIROL INCORPORATED, AS *AMICUS CURIAE*

Statement

By letters which will be filed with the Court along with this brief all parties have consented that Clairol Incorporated, a Delaware corporation with its principal office at 1290 Avenue of the Americas, New York, New York 10019, file a brief herein as *amicus curiae.*

Clairol's interest is as the respondent in a Federal Trade Commission proceeding (Commission Docket Number 8647). A final cease and desist order was issued against Clairol therein, based in part upon the same construction by the Commission of section 2(d) of the Robinson-Patman Act as is presented for review herein

(Commission's mimeo opinion, Docket #8647, pages 17-19;[1] and note petitioner's brief, page 14), and said order is pending now on appeal before the Court of Appeals for the ninth circuit (#21,235).

Summary of Argument

In order to answer affirmatively the question posed at page 2 of petitioner's brief (P.Br.), one must first neutralize the word "competing" in the phrase "customers competing in the distribution of such products or commodities" (Robinson-Patman Act, section 2(d), P.Br., p. 3). The verb "compete," in terms of trade, commonly means to seek to sell to the same prospective purchaser. In normal and natural contemplation, commercial or philological, wholesalers do not compete with retailers. This is commonly implicit in the concept that they occupy different functional levels. Petitioner, to succeed, must therefore sustain a burden of proving that Congress misused the word with the intention of conveying a meaning which other, easily available terminology would readily and undebatably have expressed by correct definition and ordinary understanding.

To acquit itself of this labor petitioner argues two propositions: 1) that the "basic purpose" of Congress was to have section 2(d) proscribe at least as much as does section 2(a) (implying that any wording in 2(d) to the contrary should be either disregarded or tortured into Procrustean consonance with such "basic purpose"); and 2) that "competing in the distribution of products" has a different meaning from competing in their "resale", so that the former covers wholesalers who sell to retailers who compete with direct-buying retailers.

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[1] A copy of the reference portion is attached, for the Court's convenience, as an appendix at pages 26-27, *infra*.

As to the first of these arguments:

The crucial premise is demonstrably faulty. For example, Congress included both primary and secondary line competition within the scope of 2(a), while it unarguably omitted the former from 2(d). Inescapably, then, Congress did not mean 2(d) to reach all that falls within 2(a). Any argument which depends upon that assertion for its foundation must topple.

Beyond that, the unmistakably marked differences in the plain language Congress used between 2(a) and 2(d) governing the very point in issue here shows that where it intended to regulate discriminations which might affect customers of an unfavored customer it knew how to say so explicitly, and did so ("... any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them." (Section 2(a), P.Br., p. 3.) It used no such language in 2(d). There are compelling commercial reasons for Congress to have made this differentiation, including possible destruction of the wholesaler system of distribution, or serious competitive injury to smaller retailers and manufacturers; and a mere assumption that it was inadvertent and unintended, so that petitioner is authorized to correct the statute by disregarding it, is unwarranted.

As to the second of petitioner's arguments:

In section 2(e) Congress used the word "resale" rather than "distribution." Petitioner recognizes that 2(d) and 2(e) should be read in harmony with each other (P.Br., p. 24, n. 19). While petitioner does now seem to urge that "resale" should be read as broadly as "distribution" (*ibid.*), it is plain that originally it appreciated the untenability of that, and hence necessarily contended for a critical differentiation between the two (P.Br., p. 14,

n. 9). In any event, even if "distribution" had been congressionally intended as a distinction in 2(d) from "resale" in 2(e), petitioner's argument still does not dispose of the requirement that there be competition between the favored and unfavored customers. Competition in distribution is not synonymous with engagement in distribution; its meaning is far narrower. Had Congress intended to put all customers who engage in a common channel or area of distribution on a par with each other for 2(d) and 2(e) purposes, it could readily have used that verb instead of "competing".

Argument

However they may be phrased or orchestrated, petitioner's arguments require a single basic hypothesis:

> That the word "competing" shall be read, insofar as section 2(d) of the Robinson-Patman Act is concerned, in a manner contrary to its normal meaning.

To compete is well understood as meaning to vie for the custom of the same prospective purchasers.[2]

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[2] "Competition

"1. Act of competing, esp. of seeking, or endeavoring to gain, *what another is endeavoring to gain at the same time; common* strife for the *same* object; * * * * * *

"3. *Com & Econ.* The effort of two or more parties, acting independently, to secure the custom of *a* third party by the offer of the most favorable terms; . . . ."

Webster's New Internationl Dictionary, 2nd Ed., 1960. (Emphasis added.)

"Competition

"Syn.—**competition** denotes a striving for the same object, position, prize, etc. . . . ."

Webster's New World Dictionary, College Edition, 1953.

(continued on next page)

Thus, before the respondent herein (Meyer) can be found to have induced violations of section 2(d) it must be established—unless the common and usual meaning of "competing" is rejected—that Meyer, the favored recipient of certain promotional allowances, sought to resell the relevant products to the same buyers as did the wholesalers who were not accorded such allowances.

However, since Meyer resells to consumers while the wholesalers resell to retailers, they do not compete with each other. Meyer competes with the retailers who buy from the wholesalers, but not with the wholesalers themselves.

Petitioner would surmount this obstacle to its case with the theory that despite what Congress said in 2(d), it

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"Compete

"1. To strive for something that is striven for at the same time by another; . . . ."

"Competition

"1. The act or proceeding of striving for something that is sought by another at the same time; a contention of two or more for the same object or for superiority; * * * *

"2. *Polit. Econ. & Comm.* (1) The independent endeavor of two or more persons to obtain the business patronage of a third by offering more advantageous terms as an inducement to secure trade."

Funk & Wagnalls, New Standard Dictionary of the English Language, 1963.

"Competition

"* * * The effort of two or more parties, acting independently, to secure the custom of a third party by the offer of the most favorable terms. It is the struggle between rivals *for the same trade at the same time;* the act of seeking or endeavoring to gain *what another is endeavoring to gain at the same time. Lipson* v. *Socony Vacuum Corporation,* CCA Mass; 87 F. 2d 265, 270."

Black's Law Dictionary, 4th Ed., 1951. (Emphasis added to definition.)

really meant that section to reach any differentiation in promotional allowances between customers of a supplier which might result in discrimination between larger and smaller retailers. It overtures this major theme by quoting a statement of this Court from *Broch*,[3] which is obviously over-generalized when read out of its context.[4]

Petitioner then rationalizes, apparently, that the specific wording Congress chose to particularize the conduct forbidden by section 2(d) need not be paid strict attention, since in essence it must have been meant to prohibit any activity which would be "anomalous" [5] to the Act's "basic

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[3] "The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which larger buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." (P.Br., pages 8 and 13.)

[4] In *Armour & Co.* v. *Wantock*, 323 U.S. 126, 132-133 (1944), and again in *International Brotherhood of Teamsters* v. *Hanke*, 339 U.S. 470, 480, n. 6 (1950) this Court warned the Bar against the use of its general statements in factual situations other than those particularly before the Court at the time of their utterance. *Broch*, involved section 2(c), not 2(d). Also, it did not present the Court—even so far as 2(c) was concerned—with any question of extension to tertiary, rather than secondary, line discrimination. Neither did *Simplicity*, *Lorillard*, nor *Arden* upon which petitioner also relies. (P.Br., pages 13, 23 and 24-25.)

A further element of inapplicability in certain of petitioner's citations may be here noted. Where, as in *Lorillard* (P.Br., p. 23) or House Report No. 2287 (P.Br., p. 13), reference is made to the use of "purported" promotional payments, which are but a "guise", or "evasive methods", a different situation is under contemplation from legitimate payments for promotional services actually rendered. When monies are paid purportedly for services which are not in fact performed, the excess of such remittances over the fair and reasonable value of the supposed promotional activities may be treated as an actual price discrimination. F.T.C. Guide #11, P.Br. (Appendix), p. 46; *American Cooperative Service Association* v. *Anchor Serum Company*, 153 F.2d 907 (7 Cir. 1946); cert. den., 329 U.S. 721 (1946), rehearing den., 329 U.S. 826 (1946). As such, it would be governed by 2(a) of the Robinson-Patman Act, which, in contradistinction to 2(d), expressly embraces tertiary line discriminatory effects (*infra*, pages 21-23).

[5] P.Br., pp. 18 et seq.

purpose",[6] and that, language or no language, section 2(d) should, therefore, be read at least as broadly as section 2(a).[7]

Apart from the fact, which will later be demonstrated at pages 15-23, that the language of section 2(d) simply does not allow the necessary tinkering to permit so undisciplined an enforcement of the Act,[8] petitioner's reliance upon its concept of the "basic purpose" of the Act, and upon a congressional intent to broad-stroke as unlawful anything which could not be reconciled therewith (i.e., which might be "anomalous" thereto), and upon an hypothesis that Congress meant to make 2(d) at least coextensive with 2(a), are all subject to critical deficiencies, which will now be discussed.

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[6] P.Br., pp. 8, 13-18.

[7] P.Br., pp. 9-10, 24-28.

[8] In an effort to find room within the terminology of 2(d) for its decision here, petitioner "relied upon the fact that 'the statute speaks of competition in the "distribution" of the products, not merely of competition in their "resale"' (R. 63) . . ." (P.Br., p. 14, n. 9). However, the two quoted words are, for section 2(d) purposes to be read alike (*infra*, pages 18-19), for "resale" is expressly used in 2(e), and petitioner concedes, "Despite some differences in the language of the two subsections . . . it is only logical that 2(d) and 2(e) be construed as having the same scope." (P.Br., p. 24, n. 19.)

1.

Congress did not enact in section 2(d) a general statutory proscription against any conduct which might violate a basic purpose as such.

Whatever may have been the underlying motivation that stimulated passage of the Robinson-Patman Act, Congress did not merely draft a free-form mandate. It particularized the activities it intended to proscribe, leaving unforbidden those not so interdicted. It did not simply write "It shall be unlawful to engage in any device by which larger buyers may gain discriminatory preferences over smaller ones by virtue of their greater purchasing power." It described the acts of discrimination it wished to prohibit, even expressly excluding therefrom some which quite obviously contravene what petitioner perceives as the "basic purpose" of the Act as generalized in the earlier quoted language from *Broch*.[9]

Thus, problems of 2(d) application are not to be solved by the simplistic device of outlawing any promotional allowance which results in larger buyers gaining a discriminatory preference over smaller ones, or which is inconsistent with what petitioner conceives to be the "basic purpose" of the Act. One must look to the language used by Congress to specify the form of conduct it elected to prohibit. If the questioned activity is not in that catalog it has been left lawful by Congress even though it might seem opposed in spirit to the abstract philosophy of the statute.

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[9] E.g., cost-justified discriminations [2(a)], and those granted to meet competition [2(b)], both of which commonly accrue to the benefit of larger rather than smaller purchasers. Note *F.T.C.* v. *Standard Oil Co.*, 340 U.S. 231 (1951), holding that the 2(b) exemption applies even though competition may thereby be actually injured.

2.

Congress did not intend section 2(d) to be at least as broad as section 2(a).

One of the major areas of price discrimination prohibited by section 2(a) is that which has impact upon primary line competition. *F.T.C.* v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960). Section 2(d) reaches this not at all. Geographic discriminations in promotional allowances are lawful under 2(d) regardless of how injuriously they may affect primary line competitors, since they are not barred if the secondary line favored and unfavored customers do not compete with each other (e.g., are in non-competitive geographic areas).

If Congress drafted 2(d) to fall so far short of 2(a) in a respect as important as this to the "basic purpose" of the Robinson-Patman Act, it plainly did not intend, as a blanket proposition, to echo in 2(d) for promotional allowances whatever it had already provided in 2(a) for prices. One is, therefore, relegated to the language of 2(d) itself for guidance as to its effect. Anomalousness with the "basic purpose" of section 2(a) can hardly predominate over wording as the ultimate criterion of 2(d)'s application when promotional discriminations remain lawful thereunder even though they seriously prejudice primary (but not secondary) line competition and hence would undoubtedly be illegal under section 2(a) if made in the form of price discriminations.

3.

There is sufficient reason for not extending section 2(d) to customers of customers that Congress's decision not to do so need not be looked upon as an aberration.

A host of anomalies may be evoked if one proceeds from the commercially unrealistic premise that wholesalers and retailers should be treated alike with regard to their promotional functions.

Their economic characteristics are too disparate, their business conditions too dissimilar, to permit their being arbitrarily pressurized into the same operational mold by legislative fiat.

Congress should not be lightly presumed to have been either ignorant or disregardful of so apparent a reality. More than enough reason exists to differentiate between wholesalers and retailers as occupants of different distributional levels (non-competing) that one cannot assume irrationality or implausibility in a congressional election to do so. Neither can one arbitrarily reject as meaningless the verbal evidence inherent in the legislative use of the readily understood term "competing" that such was its actual intent.

Congress may well have foreseen more harm than good resulting to smaller retailers (and smaller manufacturers as well) from mandating that wholesalers be treated equally with retailers under section 2(d).

It is clear, for example, that direct dealing between larger retailers and larger manufacturers is the product of natural economic laws. The size of such purchasers

justifies maintenance of a major sales structure by a vendor to tap their trade; and it is the bigger manufacturer who possesses the necessary resources for creating and operating such an arm.

It requires a wholesaler, on the other hand, to serve this purpose for smaller buyers and sellers. His economic function is to aggregate the demand of smaller customers and the supply of smaller manufacturers, joining them through the centralizing channel which he provides, and thus facilitating a flow of trade between them.

In short, the wholesaler constitutes an important medium whereby smaller retailers may have access to manufacturers, both large and small; and, reciprocally, for smaller manufacturers to reach retailers of varying sizes. It would, therefore, require an expression by Congress clear beyond the possibility of debate before an intent should be imputed to it to impede wholesaling in the name of protecting the competitive interests of smaller retailers. Yet that is what Congress could have thought might happen had it written 2(d) in the manner petitioner contends it should be applied.

To illustrate, the functional discount upon which the wholesaling operation subsists is justifiable only to the extent that manufacturers find it economical and productive to sell in that manner to wholesalers. If manufacturers were compelled to extend to wholesalers the same promotional benefits which they accord retailers, a major element of cost saving in trading with wholesalers would be nullified. Manufacturers could, in consequence, be expected to narrow the wholesalers' functional discounts which, in turn, would produce either an ominous diminishment of their profit margins or an increase in their prices to retailers.

Many manufacturers (particularly the larger ones) would find the additional costs and administrative burdens of operating promotional programs through both wholesalers and retailers so great that they might be compelled to stop dealing with wholesalers entirely in order to avoid such impositions.[10] Larger vendors, especially, would be able to rely upon their own sales forces to service the cream of the retailers, namely, those of large and medium size but their channels of distribution to the smaller retailers would then atrophy.

Access of smaller retailers to major manufacturers through wholesalers would suffer, and wholesalers, depleted of trade with larger manufacturers, might fall by the wayside.

Where the latter occurs, smaller manufacturers—who cannot afford to operate large sales forces of their own—would be left without adequate distributional avenues; and smaller retailers would lose them, also, as sources of supply.

Further, manufacturers who expect value received for the promotional monies they pay to retailers might well conclude they will not receive it from wholesalers, who do not have the trading contacts with consumers that is important to the success of such programs.[11] Rather than

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[10] It is inescapable that the policing, enforcement and other administrative burdens incumbent upon the supplier to make operation of petitioner's concepts feasible would involve substantial additional expense (P.Br., pages 33, 35, 36 and 38).

[11] In-store displays and promotional activities (and maintenance of adequate inventories to meet consumer orders) are important elements of most consumer packaged-goods cooperative promotional programs. Meyer, for example conducted sales meetings and sales contests to inform and offer incentives to its sales personnel in connection with the promotions involved in this case. It also prepared and constructed window displays and in-store displays, signs and banners (CX 6, 13, 18, 19, 200, 201; R. [Ct. of App.] 428-430, 692). Similarly, Clairol's "Sales Promotion

waste their money in payments to wholesalers in the lip service to §2(d) which petitioner demands, they might well be expected either to discontinue cooperative retailing promotions altogether or, as previously mentioned, by-pass wholesalers as a channel of distribution. Congress would not ordinarily be thought to have sought either of these consequences.

Moreover, for many product categories there are tens of thousands of retailers purchasing such items from whole-

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Agreement", involved in F.T.C. Docket #8647, attachment 92 to the stipulation of facts therein, provides, among other matters:

"1. Retailer will, in each store or department owned, operated or controlled by him, maintain stocks of the above products in sizes and quantities adequate to supply consumer demands and to provide the display required by paragraph 2 below.

"2. Manufacturer's products are to be displayed by Retailer in a good traffic location with such location and the size of the display to be at least as favorable as that given any competitive products. The space devoted to the display of each of the manufacturer's products as compared to the space devoted to competitive products will be at least proportional to Retailer's current sales volume for such manufacturer's products in said store or department as compared to the competitive products.

"3. Retailer will, in each store or department which Retailer's policy does not prohibit special display promotions and in which such display promotions are provided for competitive products, conduct special display promotions of manufacturer's products at least once in each quarter. Such special display promotions will be in addition to the regular display required by paragraph 2 above.

"4. Retailer agrees to use manufacturer's display material either of a permanent or temporary nature where policy permits, if such display material is used on any competing brands.

"5. Retailer agrees to permit manufacturer's representatives to take inventory of the entire line on every call if not contrary to Retailer's policy.

"6. If the issuance of bulletins to store personnel is a regular part of the Retailer's operation, manufacturer's current promotion will be included and a copy sent to manufacturer's Sales Department at 1290 Avenue of the Americas, New York 19, New York."

The wholesaling function has no room for such promotional activities vis-a-vis consumers (Cf. P.Br., p. 31).

salers. Individually, these accounts may be too small for the manufacturer to deal with economically. Nonetheless, he would be forced to incur many of the costs of doing so if, through the medium of their wholesalers, they must be extended all the manufacturer's promotional arrangements. He would have to examine and act upon hundreds of thousands of proofs of performance, invoices and documents to insure that the payments have been properly earned.[12] Thus, manufacturers might be forced to choose between eliminating either the promotional program or the wholesaler in view of the expense involved in policing and administering a cooperative program under petitioner's rules, if it should become mandatory to extend it to myriads of low-volume, relatively unproductive accounts, such as many who buy from wholesalers.

If it could be, and were, left to the wholesaler to handle such administrative deatils (P.Br., pages 31-35), the added expense of doing so would not thereby be eliminated. It would simply be shifted to the wholesaler, who would probably be less able, economically, to bear it than the supplier.[13] Either his own profit margin (already perilously

[12] Paragraph 11 of petitioner's Guides (P.Br., Appendix, pp. 45-46) reads: "11. *Checking customer's use of payments.* The seller must take reasonable precautions to see that the services he is paying for are furnished and also that he is not overpaying for them. Moreover, the customer must expend the value received in full solely for the purpose for which the allowances were given. If the seller knows or should know that what he pays or furnishes is not being properly used, the payments or services must be discontinued. It should be noted that payments by the seller where the customer performs no services may result in legal action against the seller under Section 2(a) of the Robinson-Patman Act and against the customer under Section 2(f) of that law. Likewise, a seller may not properly pay, nor may a customer receive and retain, any amount in excess of that actually used by the customer to perform the service."

[13] The supplier would still have to police to assure that the wholesaler is indeed passing on the benefits and sub-policing its customers in turn. And note the inordinate further expense implicit in implementing petitioner's concept of alternative available benefits (P.Br., pages 35-36):

slim in many cases) would be decreased *pro tanto,* or he would be compelled to pass on such costs in higher prices to the smaller retailers he serves (including those who do not even use or benefit from the promotional program). Congress may quite reasonably have wished to avoid a likelihood of precipitating such consequences.

Also, many retailers purchase a given product from more than one wholesaler. This would multiply correspondingly the administrative and policing burdens of the supplier. So, too, would the existence—which characterizes a number of industries—of additional levels of distribution, such as sub-jobbers and distributors, along with wholesalers.

Neither is it rationally to be presumed that Congress intended to put smaller manufacturers to the competitive strain which the petitioner's position would generate. At present, as illustrated by the case at bar, larger manufacturers who offer cooperative promotional programs to their direct buying retailers usually do not extend them to wholesaler customers as well. The smaller manufacturers who, as pointed out above, are more dependent than larger ones upon wholesalers to reach their markets are, therefore, not now faced with the expensive necessity of matching such promotional payments to wholesalers in order to meet competition. Petitioner's construction of 2(d), however, would change that, imposing an additional cost of doing business upon smaller manufacturers which might well prove critical for many of them.

Petitioner's bland posture that its construction of 2(d) is all to the benefit of the smaller retailer is, at its best, far too simplistic. The real economic probabilities point the other way. If they do not outweigh petitioner's rationale, they at least balance the scale, and dictate that there is no force to an argument that Congress must have intended to use the word "competing" in a strained and

unusual manner because only thus would salutary economic effects follow.

It is not so plainly a "reasonable and proper" interpretation of Congress's intent (P.Br., p. 8) which might likely lead to frustrational abandonment of cooperative promotional programs, or substantial discouragement of larger manufacturers from distributing through wholesaler channels. Smaller retailers will not be helped if their wholesalers are "protected" out of business.

4.

The language of section 2(d) precludes petitioner's construction.

The real question here is not whether petitioner's arguments are sound that Congress, to better accomplish the thematic purpose of the Robinson-Patman Act, should have mandated that wholesalers receive the same allowances under section 2(d) as retailers who compete with their customers. The issue, rather, is whether Congress chose to do so.

To answer that requires, under basic precepts of statutory construction, that the words the legislature used shall be taken in their common and usual sense, absent a most persuasive showing that they were intended to be abnormally read.[14]

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[14] A statute whose language is clear and not ambiguous must be given effect according to its words without resort to external aids of construction. " 'Where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.' " *United States* v. *Lexington Mill & Elevator Co.*, 232 U.S. 399, 409-410 (1914), quoting from *Lake County* v. *Rollins*, 130 U.S. 662, 670 (1889); see also *Helvering* v. *City Bank Co.*, 296 U.S. 85, 89 (1935).

There is no such demonstration here.

To the contrary, section 2(d) is part of the antitrust laws, and competition is a familiar concept in their context. Every facet of their administration prior to the Robinson-Patman Act had been consonant with the normal understanding of that term—i.e., the function of commercial rivalry between two or more sellers for the trade of the same customers. No application of the antitrust laws that *amicus* has been able to find, whether before or after the Robinson-Patman Act[15] has been predicated upon the bizarre assumption that a wholesaler competes with a retailer, except where the wholesaler sells to consumers as well as to the trade, and, to that extent, ceases to be a wholesaler.[16]

Every presumption must be in favor of the conclusion that when Congress chose "competing" to express its intent in section 2(d) [an addition to the antitrust laws] it did so with full knowledge of 1) the word's usual and clear meaning, 2) its meaning in antitrust usage generally, and, finally, that 1) and 2) are completely in harmony with each other.

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[15] With the exception of *Krug* v. *International Telephone and Telegraph Corp.*, 142 F. Supp. 230 (D.C.N.J. 1956), which will be discussed *infra*, pages 20-22.

[16] *L. & C. Mayers Co.* v. *F.T.C.*, 97 F.2d 365 (2 Cir. 1938); *Machen* v. *F.T.C.*, 126 F.2d 420 (2 Cir. 1942). Note *In the Matter of Federated Nationwide Wholesalers Service, et al.* (F.T.C. Docket No. 8649), CCH Trade Reg. Rep. ¶17,995 (1967):

> "In some instances, a merchant combines the functions of a wholesaler and a retailer, and sells both to resellers and to consumers. If a large proportion of such a merchant's sales are made to consumers on a regular basis, the use of the term 'wholesaler' as above defined, may be misleading and deceptive. Such a merchant functions as a wholesaler when selling to resellers and acts as a retailer when selling to consumers. Under such circumstances, we recognize that the merchant is performing a dual role and is a hybrid of some sort. Thus, a representation that such a seller is a wholesaler is not entirely true." (At page 20,371)

Did Congress, then, suddenly intend that for 2(d) purposes the word should bear a meaning it had never carried before? Yes, says the petitioner, because Congress stipulated competition *in the distribution* rather than in the resale of the affected products (P.Br., p. 14, n. 9).

If nothing else, this argument would seem to accept that if "distribution" in section 2(d) is used as the equivalent of "resale" in section 2(e) petitioner has no case.

And, indeed, that is the very situation, for it cannot be doubted that minor variations in language between 2(d) and 2(e) are devoid of substantive significance.[17]

> "It seems clear, upon a study of these sections, that Sections 2(d) and 2(e) are companion sections and that distinctions between them should not be drawn merely because of the differences in terminology employed in each section." *State Wholesale Grocers* v. *Great Atlantic & Pacific Tea Co.*, 154 F. Supp. 471, 474 (N.D. Ill. 1957 E.D.), *modified on other grounds*, 258 F. 2d 831 (7th Cir. 1958), *cert. denied*, 358 U.S. 947 (1959).

Note the discussion in Rowe, Price Discrimination Under the Robinson-Patman Act, §13.9 "Reconciliation of disparities in Sections 2(d) and 2(e)" pp. 390-391 (1962, and Supp. 1964), which he introduces with the paragraph:

> "Although the text of Sections 2(d) and 2(e) contains a spate of semantic discrepancies, courts view these provisions as reciprocal bans of coextensive scope irrespective of minor textual variations."

Revealingly, it does not even occur to Rowe, in listing the "semantic discrepancies", to mention the variants "dis-

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[17] As petitioner appears to concede (*supra*, p. 7, n. 8).

tribution" and "resale". Corroborative of the fact that this is a difference which has not struck anyone as being meaningful (and especially pertinent to the issue here) are cases which use "resale" whether discussing 2(d) or 2(e):

> "Section 2(d) of the Robinson-Patman Act prohibits *payments* to one's customer as compensation for services or facilities furnished by the customer in connection with his resale of the merchandise unless the payments are available on proportionately equal terms to all customers competing in the resale." *Empire Rayon Co.* v. *American Viscose Corp.*, 238 F.Supp. 556, 560 (S.D.N.Y. 1965) *revs'd on other grounds* 354 F.2d 182 (2 Cir. 1965) subsequently reinstated and affirmed after reargument before the court *en banc*, 364 F.2d 491 (1966), cert. den. 385 U.S. 1002 (1967); see also *Exquisite Form Brassiere* v. *F.T.C.*, 301 F.2d 499, 500 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962); *Henry Rosenfeld, Inc.*, 52 F.T.C. 1535, 1548 (June 29, 1956).

Even beyond that, however, "competing in the distribution of such products" is a compound prerequisite, each component of which must be satisfied before violation can be found. Even if "distribution" were not the equivalent of "resale", it would still be necessary to find the existence of *competition* between the favored and unfavored customers; and, as the Court of Appeals held, no normal employment of that term can envisage, on the one hand, retailers (who sell to consumers), and, on the other, wholesalers (who sell to retailers) in such a relationship to each other.

It is not disputed that the wholesalers in this case were engaged in the distribution of certain products, and that Meyer was also engaged in the distribution of the same

products, but to engage in is not necessarily to compete.[18] The manufacturers and suppliers also engage in the distribution of the same products, but that does not establish them as competing with retailers. If Congress had intended that common participation in the distribution process should be enough to require that wholesalers and retailers be treated equally under 2(d), it could readily have written "engaging". That would easily and clearly have manifested an intent to exceed the bounds theretofore and ordinarily connoted by the chosen verb, "competing".

There is but one decision favoring petitioner's position: *Krug* v. *International Telephone & Telegraph Corp.*, 142 F.Supp. 230 (D.C.N.J. 1956).

It explained its holding as follows:

> "On the one hand, it would, upon first reading, seem that the language chosen by Congress for Section 2(d) is more limited than that for Section 2(a). The latter embraces within the area of competitive protection 'Different purchasers * * * or * * * customers of either of them', while the former uses the phrase 'customers competing in the distribution' of a particular product. On the other hand, it would seem that Congress intended by Section 2(d), as well as by Sections 2(c) and (e) for that matter, to prevent circumvention of the prohibitions of Section 2(a) by the employment of alternatives for price concessions. * * *
>
> "It is concluded that the purpose of Section 2(d) is to place discriminatory allowances on the same basis as price discriminations prohibited by Section 2(a) and that consequently the same set of circumstances give

[18] This is the fallacy of petitioner's "conduit" argument (P.Br., p. 17). Everyone, from manufacturer (if not sub-manufacturers of components) to ultimate consumer, is part of the "nexus" (*ibid.*) of distribution. But only those at the same functional levels within the "distribution network" (*ibid.*) compete with each other within the untortured meaning of the word.

> rise to a cause of action under Section 2(d), if the discrimination takes the form of unequal allowances or services, as would be the case if discrimination were a direct price discrimination under Section 2(a). This means that violation of Section 2(d) may occur when a manufacturer gives a retailer an allowance not given to a wholesaler whose customers compete with such retailer." At page 236.

This reasoning, however, disregards the fact that Congress expressly differentiated section 2(a), on the one hand, and sections 2(d) and 2(e), on the other, in substantive respects of major importance. For example, discrimination alone is not forbidden by 2(a) (there must also be a likelihood of competitive injury), while under 2(d) and 2(e) discrimination is, without more, a (*per se*) violation. Further, there are defenses to section 2(a), namely, cost justification and changes in product market or marketability, which do not pertain to either 2(d) or 2(e). Similarly, and of major importance, 2(d) and 2(e) do not embrace primary line competitive impact (*supra*, p. 9).

Thus, there is clear evidence that although 2(d) and 2(e) may have been congressionally intended to frustrate certain evasions of 2(a), it does not necessarily follow therefrom that Congress conceived them to be mirror images of each other. The substantial differences in the language Congress chose to express its intent as between 2(a) and 2(d) may not be peremptorily brushed aside.

It would seem quite plain, as the above quotation from *Krug* starts by conceding, that Congress meant section 2(a) to reach tertiary line injury (" . . . competition with any person who either grants or knowingly receives the benefits of such discrimination, or with customers of either of them") but was content to embrace only the secondary

line where 2(d) and 2(e) were concerned (" . . . unless such payment or consideration is available upon proportionally equal terms to all of the customers . . ." and " . . . upon terms not accorded to all purchasers . . .").

Emphasis is added to this recognition of the legislative intent by the ease with which Congress, had it meant the contrary, could have either incorporated promotional allowances and facilities along with price in section 2(a), or have included an "or customers of them" phrase in sections 2(d) and 2(e), as it did in 2(a).

In *F.T.C.* v. *Sun Oil Co.*, 371 U.S. 505 (1963) this Court observed:

> "Thus, since Congress expressly demonstrated in the immediately preceding provision of the Act that it knew how to expand the applicable concept of competition beyond the sole level of the seller granting the discriminatory price, it is reasonable to conclude that like clarity of expression would be present in §2(b) if the defense available thereunder were similarly intended to be broadly read. . . . There is no reason appearing on the face of the statute to assume that Congress intended to invoke by omission in §2(b) the same broad meaning . . . which it explicitly provided by inclusion in §2(a); the reasonable inference is quite the contrary." (At pages 514-515).

With little more than substitution of section 2(d) for the quoted reference to section 2(b), that language paraphrases, and the underlying thought certainly applies to the point here under discussion. In section 2(a) Congress showed that it knew how to expand the applicable concept of competition beyond the level of the seller's customer. It is reasonable to conclude that like clarity of expression would be present in section 2(d) if the reach thereof was similarly intended to be broadly read. There is no reason applicable on the face of the statute to assume that Con-

gress intended to invoke by omission in section 2(d) the same broad meaning which it explicitly provided by inclusion in section 2(a).[19] The reasonable inference is quite the contrary.

A fortiori, to reach the opposite conclusion in this case would require not only a disregard of the difference between omission and inclusion, but would also necessitate imposing a strained and extraordinary meaning upon the word Congress employed to denote its intent, i.e., "competing".[20]

Recapitulation

The qualifying phrase "competing in the distribution of", as used by Congress in section 2(d), especially when read against the markedly different (by express addition)

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[19] At pages 16-17 of its brief (n. 12), petitioner performs the intriguing gyration of starting with the premise that "competition" does not mean the same thing for the different purposes of the different sections of the Robinson-Patman Act, and concludes therefrom that it should be read the same in section 2(d) as in 2(a). We agree that the competition dealt with may be different for the various sections, but only because Congress explicitly used different language to denote what it particularly intended in each. Thus, in 2(a) it expressly stated that the competition to be protected included that between customers of customers. In 2(d), however, it equally patently limited its proscription to discriminations between customers who compete with each other, and did not extend it to situations where competition exists only with respect to customers of either of them.

[20] How strained is indicated by petitioner's evident feeling of necessity to support its position by making out a case for competition between Meyer and a "wholesaler-retailer distribution system" (P.Br., pages 8, 9, 15 and 18). Section 2(d) does not, of course, prohibit discriminations between a customer and a system. It provides only for equal treatment as between customer and customer *if* they compete with each other. If a non-customer has to be brought into the picture in order to create the pre-requisite status of competition, it seems obvious that such condition does not exist with regard to a customer. Petitioner's semantics betray an awareness that competition does not truly describe the status between customer wholesaler and customer retailer, but only between customer retailer and non-customer retailer.

wording of section 2(a), "or with customers of either of them", is not so ambiguous as to call for external aids to its construction. Taken at face value, in accordance with its customary and usual understanding, it does not extend the prohibitions of 2(d) beyond discriminations between customers who vie with each other to resell the relevant product to the same potential buyers.

Petitioner has not convincingly shown so clear a congressional intent to the contrary of the language it actually used as to require that it be construed other than according to the normal and natural meaning of its terms. The argument that the tertiary line regulation of discrimination which Congress expressly wrote into section 2(a) should be deemed included in 2(d) as well, despite its conspicuous omission therefrom, because Congress presumably intended 2(d) to be at least co-extensive with 2(a), founders upon the indisputable evidences that Congress, to the contrary, meant the two sections to be different from each other in a number of respects, using significantly individualized language in them (including that pertinent to this case) to effectuate such distinctions. Rather, good reasons, which might well have appealed to Congress, exist to call for limiting 2(d) to customers who do compete with each other (in the normal meaning of the word).

In sum, petitioner's case depends upon the propositions that, in the portion of the statute governing the issue here, Congress did not mean what it did say, and did mean what it did not say. Far more by way of substantiation than has been shown here should be required to carry such a contention to success.

CONCLUSION

The decision of the Court of Appeals herein should be affirmed.

Respectfully submitted,

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APPENDIX

The remaining issue on appeal relating to the coverage of the Act is whether a failure to make available promotional payments to wholesalers whose customers compete with direct purchasers receiving such payments is actionable under Section 2(d). A decision on this issue is not decisive on the question of whether an order should issue. Actionable discriminations between customers purchasing directly from Clairol are documented on this record, both with respect to cooperative advertising payments to beauty salons and to payments for push money and demonstrators to Gray Drug Stores in Cleveland, Ohio.[21] Nevertheless, an expression of the Commission's views on this subject is required in the light of two recent decisions by the Ninth Circuit, namely, *Fred Meyer, Inc.* v. *Federal Trade Commission*, —— F.2d —— (9th Cir. 1966), and *Tri-Valley Packing Association* v. *Federal Trade Commission*, 329 F.2d 694 (1964). We recognize that the decision of the Ninth Circuit in those cases sustains the position of respondent on this point and, if upheld, will prevent further action by the Commission under Section 2(d) to ensure equality of treatment with respect to promotional payments for a wholesaler and his customers who compete with direct buying retailers receiving such payments. The Commission nevertheless believes that in view of the importance of this issue it should adhere to the position originally taken in its decision in *Fred Meyer, Inc.*, Docket No. 7492

[21] It is only in the case of the promotional payments amounting to 5% of the purchases made available to Clairol's direct purchasing chain drug store customers in the Baltimore, Washington and Philadelphia areas but not made available to wholesalers whose customers compete with such favored customers where a ruling granting respondent's appeal and reversing the hearing examiner on this point would preclude the imposition of a cease and desist order. The initial decision fully covers this promotion as well as the payments to Gray Drug Stores and there is no need to again go over that ground in this opinion.

(1963), *modified,* —— F.2d —— (9th Cir. 1966). There we held that the statute is applicable to actual competitors without limitation by differences in the functional levels at which they operate. This construction of the statute, we believe, is in accordance with the language of the Act, is necessary to effectuate the Congressional purpose in enacting it, and is supported by the decision in *Krug* v. *International Telephone & Telegraph Corp.*, 142 F. Supp. 230, 236 (D.N.J. 1956). In this connection, we note again that Section 2(d) speaks of competition in the distribution of products and not merely of their resale. A narrower construction of the statute would inevitably lead to inequitable discrimination and place in peril the entire structure of independent food merchandising, including the traditional wholesaler and his numerous small retailer customers who would be placed completely outside the pale of the Act insofar as their competition with direct buying chains is concerned. As we noted heretofore, in *Fred Meyer,* it would conflict with economic reality to apply the prohibitions of Section 2(d) to direct buying retailers only and to ignore the fact that wholesalers compete in redistribution with integrated chains and that customers of such wholesalers compete with direct buying chains on the retail level. It would be a strange result where, as a practical matter, in this case and in other cases the protection of the statute would be applicable only to the chains but denied their smaller competitors. In view of the importance of the issue, the Commission has requested the Solicitor General to file a petition for certiorari in the Supreme Court on this point in *Fred Meyer.* In the meantime, we will adhere to our earlier ruling on this issue announced in that case.*

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* Commissioner Elman did not concur in the request to the Solicitor General asking him to file a petition for a writ of certiorari for the Commission in *Fred Meyer.*

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 27

FEDERAL TRADE COMMISSION, *Petitioner*

v.

FRED MEYER, INC., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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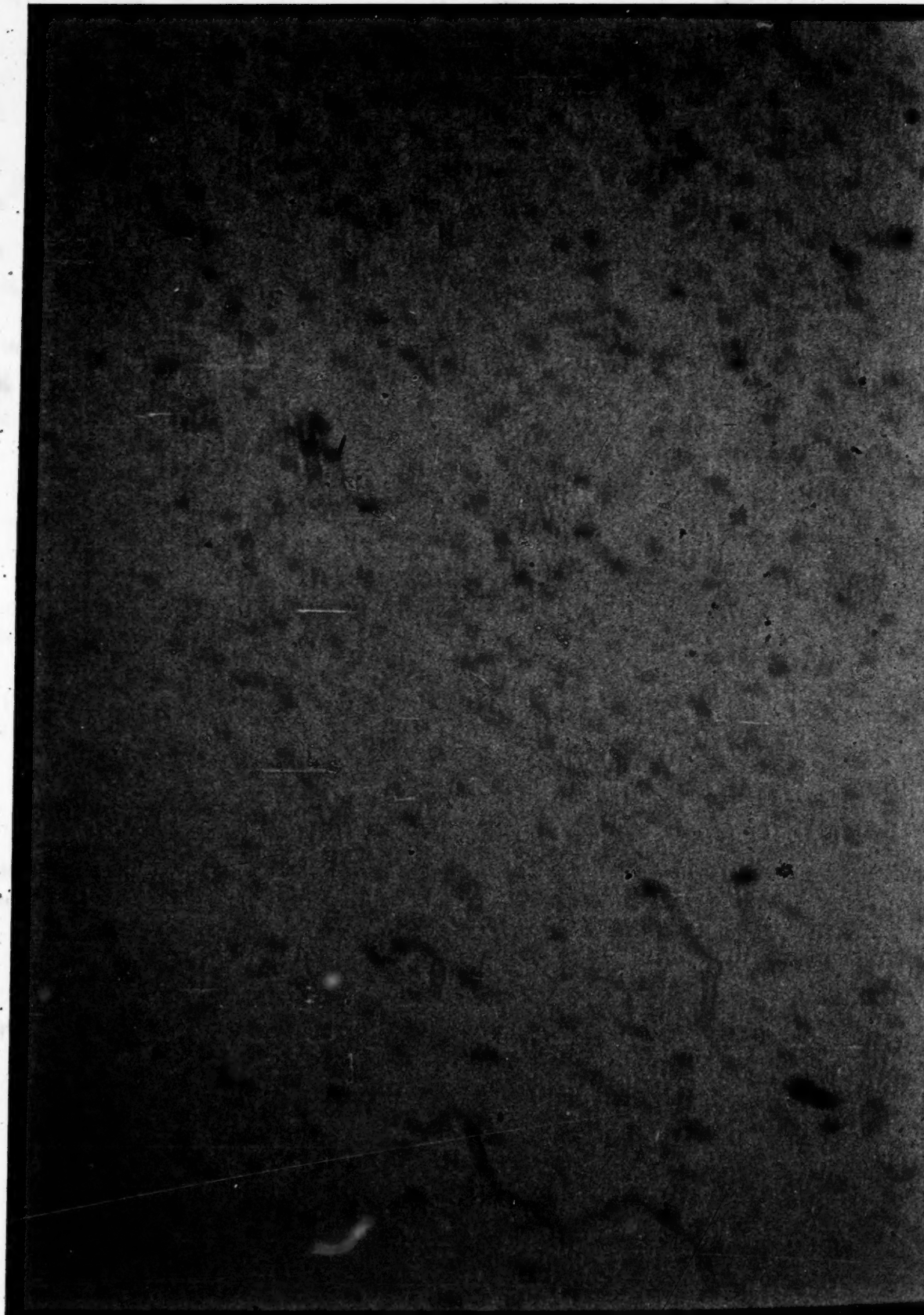

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 27

FEDERAL TRADE COMMISSION, *Petitioner*

v.

FRED MEYER, INC., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENTS

QUESTIONS PRESENTED

1. Whether Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, requires a supplier, when it grants a promotional allowance to one customer, to proportionalize the promotional allowance among other customers which operate at functionally different and distinct levels of distribution and do not compete in the resale of such supplier's products.

2. Whether the present record provides a proper or adequate basis for reaching a meaningful and informed determination of the question presented.

STATEMENT

The Federal Trade Commission (Commission) asks this Court to reverse that portion of the judgment of the court of appeals which set aside the Commission's holding that respondents (hereinafter collectively referred to as "Meyer"), a retail grocery corporation and two of its officers, violated Section 5(a) of the Federal Trade Commission Act, as amended, 66 Stat. 632, 15 U.S.C. § 45(a), by knowingly inducing promotional allowances of $350 from two of its suppliers which were not granted to two of those suppliers' wholesale customers.

The complaint against Meyer was issued on May 15, 1959 (R. 1-7). For a quarter of a century following passage of the Robinson-Patman Act, and at the time of issuance of the complaint, it was accepted law that Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13(d), requires a supplier to grant promotional allowances on proportionally equal terms *only* to those of its customers which compete at the same functional level in the resale of the goods involved. On September 9, 1959, while the instant case was still in hearings, this construction of the statute was reaffirmed by the Commission in its opinion in *Liggett & Myers Tobacco Co., Inc.*, 56 F.T.C. 221, 250-252 (1959). However, when the case reached the Commission in March 1963, the Commission declined to follow its prior construction of the statute, specifically reversed its *Liggett & Myers* holding, and held that Section 2(d) requires that a supplier grant or make available on proportionally equal terms to its *wholesale* customers any promotional allowances it grants to direct-buying *retail* customers,

where the customers to whom the wholesaler resells compete with the direct-buying retailer (R. 66). While conceding that the products of the suppliers granting the allowances had not been shown to have actually reached the shelves of the retailer-customers of the two wholesalers, the Commission held that competition between Meyer and the retailer-customers of the wholesalers in the resale of those products had nonetheless been established (R. 66-67).

Reversing the Commission's holding on this wholesaler-retailer issue, the court of appeals declined to interpret the "customers competing" language of Section 2(d) as embracing customers operating at different and distinct functional levels and followed the long-standing and presumably settled construction of the statute, *viz.*, that the obligation of a supplier who grants a promotional allowance to one customer is limited to proportionalizing that allowance among such other customers as are in actual competition at the same functional level (R. 124, 128, 130-131). In order to find a Section 2(d) violation based on the granting of disproportionate allowances as between retailers and wholesalers, the court of appeals said, it must be shown (1) that the retail customers to whom the wholesaler resells are "indirect" customers of the supplier granting the allowance, *i.e.*, that such supplier engages in a course of direct dealing with the wholesalers' customers, and (2) that those "indirect" customers in fact compete with the favored direct-buying retailer in the resale of the product involved (R. 124, 128, 130-131). The court of appeals found the proof insufficient to establish either of the two requisites.

SUMMARY OF ARGUMENT

The Commission's construction of Section 2(d) is in conflict with the logical and the congressionally intended meaning of that section. Section 2(d) prohibits discrimination in the payment of promotional allowances between "customers competing in the distribution" of the goods concerning which the allowance is made. Retailers distribute goods only to consumers and compete only with other retailers in this "distribution" function. Wholesalers distribute goods only to retailers and compete only with other wholesalers in their "distribution" function. Accordingly, without direct and convincing evidence of a contrary legislative intent, it must be assumed that Congress meant the "customers competing in the distribution" language of Section 2(d) to embrace only such reseller customers of a supplier as actually compete at the same functional level, *i.e.*, resellers that actually vie with one another for the patronage of the same customers.

There is no direct evidence that Congress intended to broaden the concept of Section 2(d) to reach "discrimination" between customers operating at different and distinct functional levels and, therefore, not engaged in competition with each other. Read in context with the other sections of the Robinson-Patman Act, the evidence of congressional intent is clearly to the contrary. Where Congress intended to prohibit discrimination between customers occupying different functional levels in the distribution system, it did so in express and specific terms. In Section 2(a) of the Act, Congress thus prohibited price discrimination which may "injure, destroy, or prevent competition with any person who either grants or knowingly re-

ceives the benefit of such discrimination, *or with customers of either of them"* (emphasis added). On the basis of this specific language, a supplier who discriminates in price against a wholesale customer and in favor of a direct-buying retail customer may be found to be in violation of Section 2(a) where the discrimination adversely affects competition between the direct-buying retailer and the retailer-customers of the wholesaler. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 55 (1948). *No such language appears in Section 2(d).*

Thus, Congress expressly demonstrated in Section 2(a) of the Act that it knew how to expand the applicable concept of competition beyond a single functional level. It must be concluded that like clarity of expression would be present in Section 2(d) if Congress had intended to expand the applicable concept of competition in that section in the same manner as it did in 2(a). See *Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505, 514-515 (1963). The legislative history of the Robinson-Patman Act, moreover, demonstrates that this was not Congress' intention and that Section 2(d) was deliberately drafted more narrowly than Section 2(a).

Further, in order to establish a violation of Section 2(a), a reasonable probability of competitive injury must be shown, and one charged with such violation is expressly allowed certain affirmative defenses and justifications. However, with the exception of the meeting competition defense, Congress made the prohibitions of Section 2(d) absolute. *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 65 (1959). Because of the very nature of *per se* of-

fenses, statutes containing such absolute prohibitions should be strictly construed. It therefore cannot be inferred that Congress meant by its silence to include by way of construction of 2(d) something which it specifically included in 2(a), a non-*per se* section.

It must be assumed that in enacting Section 2(d), Congress intended to achieve an effective and operable result. The section should not, therefore, be given a construction which would be totally impracticable in operation and would render its application realistically and economically impossible. The entire rationale of the Commission's position is that, unless wholesalers receive promotional allowances proportionate to those granted direct-buying retail customers, the retailer customers of the wholesaler will be deprived of equivalent benefits and will thereby be disadvantaged. This necessarily means that the allowance must be passed from the wholesaler to his retail customers. Wholesalers, however, are neither capable nor desirous of assuming the inescapable and innumerable burdens necessarily incident to passing on either promotional allowances or promotional benefits to their customers. And to grant an allowance to a wholesaler under the conditions that he do so would not only be futile but would likely be contrary to the broader objectives of the Sherman and Federal Trade Commission Acts. On the other hand, granting windfall promotional allowances to wholesale customers for use in connection with their own function would not inure to the benefit of the retailer-customers of the wholesaler, thus defeating the avowed purpose of the Commission's construction.

The burdens, practical difficulties and legal problems which would result from adoption of the Commission's construction, make clear that such construction could not have been intended by Congress. Administration of any promotional program by a supplier which is required to deal with retail and wholesale customers on equal promotional and advertising terms would prove far too costly to make it worth the value received. Consequently, adoption of the Commission's construction would result in one of three undesirable consequences, none of which Congress could have intended. Suppliers would be compelled to cease offering cooperative promotional programs to customers, or to increase the prices of their goods in order to compensate for the increased costs of administering the cooperative promotional programs, or to cease dealing through the wholesale distribution channel altogether.

Finally, in view of the critical importance of the issue presented, it should not be decided on the record of this case. The complaint against Meyer did not directly raise the issue and, under the state of the law at the time of trial, it appeared settled that, where the alleged discrimination was between wholesale and retail customers, it was necessary only to establish that fact and the matter was ended. Accordingly, no record exists which will allow the necessary thorough analysis of all pertinent facts and considerations, or which will provide an adequate or proper basis for reaching an informed and meaningful determination.

ARGUMENT

I. SECTION 2(d) OF THE ROBINSON-PATMAN ACT CANNOT BE CONSTRUED TO REQUIRE SUPPLIERS TO PROPORTIONALIZE PROMOTIONAL PAYMENTS AMONG CUSTOMERS OPERATING AT DIFFERENT AND DISTINCT FUNCTIONAL LEVELS OF DISTRIBUTION

Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13(d), provides:

> (d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other *customers competing in the distribution* of such products or commodities (emphasis added).

The issue before this Court is the correct and congressionally intended meaning of the italicized language — "customers competing in the distribution." Following the logical and long-standing construction of the statute, the court of appeals held that the prohibition of Section 2(d) applies only to discrimination among customers operating and competing at the same functional level of distribution and that no violation occurs where allowances granted to a direct-buying retailer are not granted to a wholesaler (R. 130-131). The Commission, on the other hand, argues that the italicized language embraces *all* participants in the *entire* system of distribution of goods from manu-

facturer to consumer; that Section 2(d) must be construed as requiring a supplier that grants promotional allowances to one customer (here a retailer) to grant proportionally equal allowances to all other customers participating in the system (wholesalers here)—regardless of the diverse and distinct functions those other customers perform—if somewhere in the tier of distribution the recipient of the allowances competes with customers of another direct-buying customer.

A. The Commission's Construction is Contrary to the Logical and the Congressionally Intended Meaning of Section 2(d)

It is a basic principle of statutory construction that where no ambiguity exists in the language of a statute, no need for interpretation arises, *Caminetti* v. *United States,* 242 U.S. 470, 485 (1917). The validity of the construction proposed by the Commission, therefore, must first be tested by the language Congress utilized in prohibiting discrimination in promotional allowances.

Different classes of customers, of course, engage in different and distinct functions in performing their respective roles. A retailer, quite clearly, "distributes" goods only to consumers; the traditional wholesaler, on the other hand, "distributes" goods only to retailers who in turn "distribute" to consumers. In this sense, "distribute" is synonomous with "resale;" and, within the usual and common meaning of the terms of 2(d), a retailer competes only with other retailers in its limited function of vying for the patronage of consumers. This construction has not only the support of logic, but when Section 2(d) is considered in the context of the other sections of

the Robinson-Patman Act, it is clear that it is the construction intended by Congress.

Each section of the Act was directed, conceptually and actually, at a different discriminatory practice. Section 2(a), generally considered the core of the Act, sought to prevent discrimination in the form of different prices—the most obvious form of discrimination. A discriminatory concession falls within 2(a) if it is made in connection with or to induce the *original sale* of the goods involved, *i.e.*, the sale by a supplier to a direct-buying customer; it is not conditioned upon the furnishing of services by the customer. *New England Confectionery Co.*, 46 F.T.C. 1041, 1059-1060 (1949). See also Rowe, *Price Discrimination Under the Robinson-Patman Act*, 103-105, 107, 376-381 (1962) [hereinafter "Rowe"]. Section 2(c) also sought to prevent discrimination in the form of price concessions but was directed specifically at concessions granted under the guise of unearned "brokerage" or "commissions." This section, too, reaches concessions made in connection with the *original sale* of the goods involved. In contrast, Sections 2(d) and 2(e) were specifically drafted and designed to prevent discrimination, not in prices, but in the granting of promotional and advertising allowances, services and facilities. Section 2(d), indeed, governs promotional and advertising arrangements to the exclusion of other arrangements, and applies only where allowances are made "as compensation or in consideration for" the furnishing of promotional services by a customer in connection with that customer's *resale* of the goods involved. *New England Confectionery Co., supra*, at 1059-1060; *Carpel Frosted Foods, Inc.*, 48 F.T.C. 581,

602 (1951); *General Foods Corp.*, 52 F.T.C. 798, 822, 828 (1956); *Russellville Can Co.* v. *American Can Co.*, 191 F. 2d 38, 56 (8th Cir. 1951); *R. H. Macy & Co.* v. *Federal Trade Commission*, 326 F. 2d 445, 448-450 (2d Cir. 1964). *Cf., Skinner* v. *United States Steel Corp.*, 233 F. 2d 762, 765 (5th Cir., 1956); *Secatore's, Inc.* v. *Esso Standard Oil Co.*, 171 F. Supp. 665, 668 (D. Mass. 1959). See also Rowe, 107, 370-372, 376-381.

The Section 2(d) concept of discrimination is thus more limited than that of Section 2(a); in the Commission's words, Section 2(d) "is in itself a very narrow definition of an illegal practice" and "is much narrower in scope than Section 2(a)." *Vanity Fair Paper Mills, Inc.*, 60 F.T.C. 568, 578 (1962). Consistent with the narrow and specific type of *practice* at which 2(d) was pointed, Congress also selected language appropriately designed to reflect and limit the *competition* which Section 2(d) was intended to protect, *viz.*, competition between customers actually competing with one another in the distribution of a supplier's goods. Had Congress intended to expand this applicable concept of competition in Section 2(d) beyond a single level of distribution, as the Commission argues, it could easily have done so—and would have done so—by the use of different language, such as that contained in Section 2(a) of the Act.

In Section 2(a), Congress prohibited price discriminations which may "injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, *or with customers of either of them*" (emphasis added). On the basis of this specific language, a supplier who discriminates in price against a wholesale

customer and in favor of a direct-buying retail customer may be found to have violated Section 2(a) where the retailer-customers of the wholesaler compete with the direct-buying retailer. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 55 (1948). Such a discrimination, however, is within the prohibition of Section 2(a) because Congress specifically and deliberately so provided (*Ibid.*). *Congress did not do so in Section (2d).*

The Commission argues that the specific language of Section 2(a), "although it supported the Court's conclusion in *Morton Salt, supra,* that the 'difference' between the price charged the favored retailer and the nonfavored wholesalers amounted to a price 'discrimination,' was not essential to it," and that the result reached in *Morton Salt* would have been the same "if the draftsman of Section 2(a), while retaining its present description of the offense of 'discrimination,' i.e., 'discriminate in price between different purchasers,' had made it a per se provision like Section 2(d) and thus omitted completely all reference to the three levels of competition at which injury can occur" (R. 64-65; Pet. Brief, p. 27, n. 22). This argument is patently unsound; for this, as the legislative history shows, is precisely what Congress deliberately did *not* do in Section 2(a).

In enacting the Robinson-Patman Act in 1936, Congress was alert to the necessity of explicitness in stating the applicable concept of competition which it sought to invoke. Prior to the Robinson-Patman amendments, substantial question had arisen as to the intended distributional level coverage of the original price discrimination section of the Clayton Act (38

Stat. 730).[1] When originally presented in 1935, neither the original Robinson bill[2] nor the original Patman bill[3] contained the clause relied upon in *Morton Salt, supra,* to support the application of Section 2(a) to a supplier's charging a direct-buying retail customer a price lower than that charged a wholesale customer. Both the Senate and the House Committee to which the bills were referred, however, believed the language should be added in order to broaden the "jurisdictional scope" of Section 2(a) and to make explicit the competition it sought to protect. The added language, explained the House Committee,

> . . . accomplishes a substantial broadening of a similar clause now contained in section 2 of the Clayton Act. The existing law has in practice been too restrictive in requiring a showing of general injury to competitive conditions in the line of commerce concerned, whereas the more immediately important concern is in injury to the competitor victimized by the discrimination . . . . Through this broadening of the jurisdiction of the act, a more effective suppression of such injuries is possible and the more effective protec-

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[1] In the early 1920's, the Second Circuit had interpreted Section 2 of the Clayton Act as being inapplicable where the prejudicial competitive effects occurred only at the buyer level. *National Biscuit Co.* v. *Federal Trade Commission,* 299 Fed. 733 (2d Cir. 1924); *Mennen Co.* v. *Federal Trade Commission,* 288 Fed. 774 (2d Cir. 1923). This interpretation was later repudiated by the Supreme Court. *George Van Camp & Sons Co.* v. *American Can Co.,* 278 U.S. 245 (1929).

[2] S. 3154, 74th Cong., 1st Sess. (June 26, 1935).

[3] H.R. 8442, 74th Cong., 1st Sess. (June 11, 1935).

> tion of the public interest at the same time is achieved.[4]

While thus broadening the applicable concept of competition of Section 2(a), both the Senate and the House Committee left the more restrictive language of the promotional allowance sections of the respective bills intact. Both sections (Section 2(c) of the Senate bill and Section 2(d) of the House bill) prohibited, as does the enacted version, the payment of promotional allowances to one customer unless available "on proportionally equal terms to all other *customers competing in the distribution*" of the goods involved. The purpose of the section, the Committees explained, was to prohibit the payment of promotional allowances to one customer which *"his smaller competitor"* is unable to command. H. R. Rep. No. 2287, 74th Cong., 2d Sess. 16 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 7 (1936). The section, the House report continued, "address[es] this evil by prohibiting the granting of such allowances . . . except when accorded or made available to all *competing customers* on proportionally equal terms" (emphasis added). H. R. Rep. No. 2287, 74th Cong., 2d Sess. 16 (1936). Consistent with its expression that the section was designed to place actually competing customers—i.e., customers competing at the same functional level—on equal footing, the House Commitee then stated (*Ibid.*):

> To illustrate: Where, as was revealed in the hearings earlier referred to in this report, a manu-

[4] H.R. Rep. No. 2287, 74th Cong., 2d Sess. 8 (1936). The Senate Committee report explained the purpose of adding the broadening language in almost identical terms. S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936).

> facturer grants to a particular chain distributor an advertising allowance of a stated amount per month per store in which the former's goods are sold, *a competing customer with a smaller number of stores,* but equally able to furnish the same service per store, and under conditions of the same value to the seller, would be entitled to a similar allowance on that basis (emphasis added).[5]

This Court observed in *Federal Trade Commission* v. *Sun Oil Co.,* 371 U.S. 505, 514-515 (1963), that where Congress in the Robinson-Patman Act intended to expand the meaning of "competition" beyond that between customers occupying a single functional level it knew precisely how to do so. There, the Court held that the term "competitor," as used in the Section 2(b) "meeting competition" proviso of the Act, cannot be construed as meaning one operating at a functional level different from that of the discriminator. The reasoning of the Court in so holding is fully applicable here:

> Thus, since Congress expressly demonstrated in the immediately preceding provision of the Act [Section 2(a)] that it knew how to expand the applicable concept of competition beyond the sole level of the seller granting the discriminatory price, it is reasonable to conclude that like clarity of expression would be present in § 2(b) if the defense available thereunder were similarly intended to be broadly read to encompass, as is urged, the meeting of lower prices set not only by the offending seller's competitor, but also by the purchaser's competitor. There is no reason appearing on the face of the statute to assume that Congress intended to invoke by omission in § 2(b) the same broad meaning of competition or com-

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[5] The Senate Committee used the same illustration. S. Rep. No. 1502, 74th Cong., 2d Sess. 8 (1936).

petitor which it explicitly provided by inclusion in § 2(a); the reasonable inference is quite the contrary.

Nor is there any reason to assume that Congress intended to invoke by omission in *(2)d* the same broad meaning of competition which it explicitly provided in 2(a). Here, too, the reasonable inference is quite the contrary.[6]

Despite all this, the Commission, while acknowledging the differences in the language of Sections 2(a) and 2(d), asserts that this difference "demonstrates, if anything, that Congress wished the prohibition of Section 2(d) to be interpreted more *broadly,* not more narrowly, than that contained in Section 2(a) . . ." (Pet. Brief, pp. 27-28). This, according to the Commission, is evidenced by the fact that Congress made 2(d) a *per se* section. This very fact, however, precludes any inference that the 2(d) prohibitions were meant to be more broadly applied than those of 2(a).

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[6] The Commission argues that the *Sun Oil* holding has no application to the issue here because the "statutory provisions and policy considerations involved in *Sun Oil* are obviously quite different . . ." (Pet. Brief, p. 16, n. 12). The *statutory construction principle* for which *Sun Oil* stands, however, is quite obviously applicable.

Sun Oil Company argued that Section 2(b) should be construed to allow a gasoline refiner to meet the price of a competitor of its retail customer since its retail customer served merely as a conduit in the distribution of gasoline from refiner to consumer. Here, the Commission's argument is similarly structured; it argues that the 2(d) concept of competition is broad enough to require a manufacturer to grant wholesale customers promotional allowances granted retail customers because the wholesaler is merely a conduit in the distribution of the manufacturer's goods to the consumer. Clearly, the Court's *Sun Oil* statutory construction rationale in rejecting this "conduit theory" interpretation of 2(b) precludes such an interpretation of 2(d).

In order to establish a violation of Section 2(a), it is necessary to show a reasonable probability of competitive injury, and a supplier charged with such violation is expressly allowed certain affirmative defenses and justifications. It may defend on the basis that the lower price was given to meet competition; that the price was cost justified; or that it was in response to changing conditions, such as deterioration of perishable goods, obsolescence of seasonal goods, distress sales, and sales in discontinuing a line of goods. With the exception of the meeting competition defense, however, Congress made the prohibitions of 2(d) absolute; competitive injury need not be shown and none of the justifications available under 2(a) are applicable. *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 65 (1959). Because of the very nature of *per se* offenses, and the absence of any opportunity for affirmative defense or justification, plus the fact that the Commission is relieved of the burden of showing competitive injury, it cannot be inferred that Congress meant by its silence to include by way of construction of 2(d) something which it specifically included in 2(a), a non *per se* section.[7] As stated in *Simplicity Pattern, supra,*

[7] Contrary to its argument here that 2(d) must be given a broad interpretation (Pet. Brief, pp. 27-28), the Commission itself has recognized that 2(d) "is in itself a very narrow definition of an illegal practice" and "is much narrower in scope than Section 2(a)." *Vanity Fair Paper Mills, Inc.*, 60 F.T.C. 568, 578 (1962). The very rationale supporting a *per se* application to 2(d) is that it describes a specific and narrow practice which Congress deemed "always led to the undesired effects on competition." *Grand Union Co.* v. *Federal Trade Commission*, 300 F.2d 92, 99 (2d Cir. 1962). Before the Commission's holding in this case, it had been uniformly accepted that the undesired effects which "inevitably" flow from a discrimination in promotional allowances result only when the discrimination occurs between customers in actual competition at the same functional level. See note 23, p. 30, *infra*.

the courts "cannot supply what Congress has studiously omitted." 360 U.S. at 67.

The Commission's protestations that the court of appeals' ruling "would create a serious loophole in the enforcement of the Robinson-Patman Act" (Pet. Brief, p. 13) cannot be taken seriously. For twenty-seven years prior to this case, the Commission administered Section 2(d) under the same construction as that applied by the court below. Obviously, the Commission never before believed that construction created a "serious loophole" in the Act's enforcement. The Commission's assertion that effective enforcement is dependent upon the construction it now urges must therefore be taken for what it is—an assertion without basis in fact or economic need. This Court's answer to a similar contention of the Commission in *Federal Trade Commission* v. *Bunte Brothers*, 312 U.S. 349, 351-352 (1941), is apposite.

> That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by a general statutory language, so *the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred* (footnote omitted; emphasis added).

The foregoing, we believe, demonstrates that Congress deliberately refrained from broadening the applicable concept of competition and "discrimination" in Section 2(d) to require suppliers to deal with re-

tail and wholesale customers on equal promotional and advertising terms. As shown below, Congress' election to limit the reach of 2(d), instead, only to discriminations between customers engaged and actually competing at the same functional level is supported by the economically distinct functions the various customer classes perform in the distribution system.[8] But even were this not so, this Court's caution against reading something into the Act which is not expressed must be borne in mind: "Entirely aside from the fact that this Court is not in a position to review the economic wisdom of Congress, we cannot say that the legislative decision to treat price and other discriminations differently is without a rational basis." *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 67-68 (1959).

B. The Commission's Construction is Impracticable in Operation and Impossible of Application

It must be assumed that in enacting Section 2(d), Congress intended to achieve an effective and operable result. It cannot, therefore, be given a construction which would be impracticable in operation and which would render its application realistically and economically impossible. This, however, is precisely what the Commission proposes.

The practical difficulties inherent in attempting to apply the stringent Section 2(d) requirement of proportional equality to functionally distinct customer

[8] The Robinson-Patman Act was designed to allow for just such differences. The object of the Act, as stated by both the House and the Senate Committee, was to "suppress more effectually discriminations between customers of the same seller *not supported by sound economic differences in their business positions* . . ." (emphasis added). H.R. Rep. No. 2287, 74th Cong., 2d Sess. 7 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 3 (1936).

classes are innumerable and insuperable. Only a most superficial and uninformed analysis of the problems would lead to any other conclusion. In its brief in opposition to the Commission's cross-petition for a writ of certiorari, Meyer set forth some of the many practical considerations which demonstrate the incongruity of the Commission's proposed construction. The Commission refers to these as "hypothetical situations" and attempts to show that no operational or administrative difficulties would be posed under its proposed construction of 2(d). This attempt, however, suggests not only a surprising naivete but openly demonstrates just the type of conflicts which Meyer claims will result should the Commission's construction be adopted.

The underlying rationale of the Commission's position is that, unless wholesalers receive promotional payments, the retailer-customers of the wholesalers will be disadvantaged. This means, of course, that the allowance, in one form or another, must be passed on to the retailer. But it is impossible to accomplish this objective within the framework of Section 2(d) without destroying the independent status of wholesalers, without running headlong into the prohibitions of the other antitrust laws, and without burdening both suppliers and wholesalers with wholly unrealistic, uneconomic and impossible tasks.

The Commission's answer to this runs the spectrum from absolute impracticability to what would appear direct violations of Section 1 of the Sherman Act, 26 Stat. 209, as amended, 50 Stat. 693, 69 Stat. 282, 15 U.S.C. § 1. If a direct-buying retailer is given an allowance for in-store promotion, for example, the

Commission asserts that Section 2(d) could be satisfied by "offering a similar allowance to the wholesaler upon terms requiring him to pass on an appropriate share to those of his retailer customers who will in turn perform similar in-store promotions" (Pet. Brief p. 31). The Commission does not attempt to answer the initial question of whether a wholesaler would be willing or able to assume the inescapable burdens inherent in such a promotional scheme, which would necessarily include: (1) determining which of his retailer-customers (frequently several hundred in number) compete with the direct-buying retailer and are, therefore, entitled to participate;[9] (2) determining which of these entitled customers wish to participate;[10] (3) determining exactly what portion of the allowance each participating customer is entitled to receive;[11] (4) con-

[9] Only such of the wholesaler's customers as are in actual competition with the direct-buying retailer would be entitled to receive the promotional benefits. See FTC's 1960 Guides for Advertising Allowances and Other Merchandising Payments and Services, Pars. 9 and 12, 1 CCH Trade Reg. Rep. ¶3980, at pp. 6077, 6078. [These Guides are printed in pertinent part in the Appendix of the Brief for the Federal Trade Commission, pp. 41-48, and for convenience are hereinafter cited to that Appendix.] Were a supplier, even indirectly, to provide promotional allowances to customers not in such competition, the allowance, under the Commission's theory, would itself violate Section 2(d).

[10] Action must be taken "to inform all . . . customers competing with any participating customer that the plan is available." FTC Guides, Par. 8, Pet. Brief Appendix, p. 44.

[11] To comply with Section 2(d), the allowance must, of course, be proportionalized. This requires, in turn, an analysis of each customer's purchases, requiring examination of perhaps thousands of invoices, and a basing of the amount of the allowance "on the dollar volume or on the quantity of goods purchased during a specified time." FTC Guides, Par. 7, Pet. Brief Appendix, p. 43.

structing a usable program to fit each participating customer's particular business;[12] (5) processing retailer claims for reimbursement; (6) assuring and collecting proof that the promotional activity has actually been performed by the retailer-customer;[13] (7) reimbursing the retailer-customers for the amount actually expended;[14] (8) submitting the proof of customer performance to the supplier; and, finally, (9) collecting the amount due the wholesaler from the supplier.

These burdens which would necessarily be imposed upon a wholesaler if given an allowance "upon terms requiring him to pass on an appropriate share" to his retailer-customers, as the Commission suggests (Pet. Brief, p. 31), vividly demonstrate the impracticability of the Commission's construction, as well as the futility of offering an allowance to a wholesaler on the condition that he pass it along to his customers. No whole-

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[12] A promotional plan "must not be tailored to satisfy the needs of a favored customer or class, but must be suitable and usable under reasonable terms by all competing customers. This may require offering all customers more than one way to participate in the plan." FTC Guides, Par. 9, Pet. Brief Appendix, p. 44.

[13] "[T]he customer must expend the value received in full solely for the purpose for which the allowances were given." And both the supplier and the wholesaler would be obligated to assure that the allowances are actually used for the intended purpose. FTC Guides, Par. 11, Pet. Brief Appendix, pp. 45-46.

[14] "[A] seller may not properly pay, nor may a customer properly receive and retain, any amount in excess of that actually used by the customer to perform the service." FTC Guides, Par. 11, Pet. Brief Appendix, p. 46.

saler, we submit, would be interested in or capable of assuming the necessary burdens. [15]

But the difficulties do not end here; for, as a practical matter, wholesalers do not conduct their businesses or maintain their records in such a manner as would allow them to judge entitlement, proportionality, nature of program, etc., under the stringent requirements laid down by the Commission. For a wholesaler to be in a position to accept promotional allowances, therefore, he would undoubtedly be compelled to change his whole method of doing business. The effort and expense of doing this, together with the administrative expenses he would necessarily incur in properly administering a promotional plan offered for the benefit of his retailer-customers, would quite obviously be substantial. In order to withstand this expense, the wholesaler would have but two alternatives: (1) increase the price of his goods to his retailer-customers; or (2) look to the supplier to absorb the costs incurred in administering the promotional plan. The first, of course, would result in the very disadvantage to the retailer-customers which the Commission seeks to eliminate; and the second would place the supplier in a position of discriminating against its direct-buying retailers if, in fact, the supplier paid the wholesaler's expenses.

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[15] While the record is otherwise barren on these practical issues, one wholesaler witness testified that his company "would not have been interested in an advertising allowance as such, for our Wadham's brand" since it would demand "that we perform a function of advertising, which requires an expenditure of money" and "[n]one of our stores would have been interested in advertising the Wadham's grade of corn . . . " (see Transcript of Record printed for use before the court of appeals, pp. 272-273).

Furthermore, if a supplier were to grant allowances to a wholesaler under the conditions suggested by the Commission, *i.e.*, "upon terms requiring [the wholesaler] to pass on" the allowances (Pet. Brief, p. 31), a serious question would arise as to whether the supplier is imposing such restriction and control as to constitute an unlawful tampering with the wholesaler's terms and conditions of resale, a matter within the *per se* prohibitions of both Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act.[16]

The Commission next suggests that where a direct-buying retailer is given an allowance for advertising the availability in its stores of products purchased from the supplier, Section 2(d) might be satisfied by offering a similar allowance to the wholesaler "upon terms requiring him to publish similar advertisements of the availability of the supplier's products in his retailer customers' stores" (Pet. Brief, p. 32). This too is replete with practical and legal difficulties. In the retail grocery field, for example,—and in many other fields as well—a retailer's advertising is almost universally both product and price advertising. Is the Commission proposing that it would be proper for a supplier to make an allowance, requiring assurance and proof of performance, to facilitate a common ad-

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[16] See *e.g.*, *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960); *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

vertisement by competitors relating to what, by necessity, must be a common price?[17]

The Commission's next suggestion is that, if the wholesaler prefers, the supplier itself might assume the burden of dealing with the wholesaler's customers directly (Pet. Brief, pp. 32; 34, n. 29). This highlights even further the impracticability of the Commission's proposed construction. As the Commission acknowledges (Pet. Brief, p. 32), the supplier normally does not know the identity of many—if any—of its wholesaler's retail customers. Thus, the supplier's first task would be to determine the identity of such customers as are in competition with the direct-buying retailer to whom an allowance was to be made.[18] The supplier would then have to determine which of these customers are purchasers of the goods involved, the amount

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[17] The newspaper advertisement would necessarily be a common advertisement. If an allowance is granted a direct-buying retailer for the purpose of running a newspaper advertisement, the supplier cannot lawfully or practicably grant a wholesaler an allowance large enough to permit running separate advertisements for perhaps hundreds of retailer-customers. And, obviously, the common advertisement could not state different prices for a single advertised product.

[18] It may be that the Commission would not even allow the supplier to obtain this necessary information from the wholesaler. In its Advisory Opinion Digest No. 143, the Commission advised that a plan "which requires a retailer located just outside one of the selected areas to show that he competes with one or more of the favored retailers in order to have the offer made available to him would appear to shift the responsibility of notification required under the statute. For this reason, the Commission cannot approve this particular provision of the plan should it result in discrimination against retailers located on the periphery of the selected trading areas." 3 CCH Trade Reg. Rep. ¶ 18,060 (September 12, 1967).

of such purchases, the nature of the customer's business, the type of program which the customer would find usable in that business, assure performance by the customer and obtain proof of performance. The cost to a supplier in performing these necessary tasks would obviously be so great as to counter-balance any benefits which might flow from the promotional allowances granted.[19] As in the case of the wholesaler, the only means available to the supplier to recoup these expenses would be by an increase in the cost of its goods.

Another and equally thorny problem which would be created if the supplier took it upon itself to deal with the wholesaler's retail customers directly would be that by so doing the supplier might well, under both Commission and court holdings, render such retailer-customers of the wholesalers its own "indirect" customers. Under the "indirect customer" doctrine, a retailer buying from a wholesaler, but having direct contacts with the supplier, is a "customer" of the supplier under the Robinson-Patman Act. See *Tri-Valley Packing Association* v. *Federal Trade Commission,* 329 F. 2d 694, 709 (9th Cir. 1964); *American News Co.* v. *Federal Trade Commission,* 300 F. 2d 104, 109-110 (2d Cir. 1962), *cert. denied,* 371 U.S. 824 (1962); *Kay Windsor Frocks, Inc.,* 51 F.T.C. 89, 95-96 (1954). Consequently, the ramifications in a supplier's engaging in such a course of direct dealing would extend beyond the immediate Section 2(d) problems. For, presumably, an indirect customer under 2(d) would also

[19] Retailers often purchase a given product from more than one wholesaler. Where this is true, the supplier's administrative burdens and costs would be multiplied correspondingly.

be considered an indirect customer for purposes of Section 2(a). If so, would not the supplier be responsible for assuring that its wholesaler's prices to such indirect-customers were non-discriminatory as compared with its own prices to direct-buying retailers?[20] Not only would this create a further imposition upon the independency of the wholesaler class, but it would again project the supplier into the *per se* illegal area of resale price maintenance.

Furthermore, the Commission's construction would, on its face, be impossible to apply in a chain of distribution which is more complex than the simple supplier-wholesaler-retailer setup. Merely adding another tier in the distribution process throws the Commission's concept completely awry. Where the supplier sells through a *jobber*-wholesaler-retailer distribution setup and also to direct-buying retailers, for example,—as is the case in many industries—Section 2(d) would, under the Commission's construction, apply to "discrimination" between the jobber and the direct buying retailer for both, under the Commission's interpretation, are engaged in the "distribution" of the supplier's goods. Obviously, though, the direct-buying retailer competes with neither the jobber nor with the jobber's customers.

Adoption of the Commission's construction might well spell the end of wholesalers in many industries.

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[20] *Cf., Purolator Products, Inc.* v. *Federal Trade Commission,* 352 F.2d 874 (7th Cir. 1965), petition for certiorari filed January 19, 1966; *General Auto Supplies, Inc.* v. *Federal Trade Commission,* 346 F.2d 311 (7th Cir. 1965), *cert. dismissed,* 382 U.S. 923 (1965); *Monroe Auto Equipment Co.* v. *Federal Trade Commission,* 347 F.2d 401 (7th Cir. 1965), *cert. denied,* 382 U.S. 1009 (1966).

Administration of a promotional program by a supplier which is required to deal with retail and wholesale customers on equal promotional and advertising terms would prove far too costly to make it worth the value received. Consequently, adoption of the Commission's construction would likely result in one of three wholly undesirable consequences, none of which Congress could have intended. Suppliers would be compelled to either cease offering cooperative promotional programs to customers, increase the prices of their goods in order to compensate for the increased costs of administering the cooperative promotional programs, or cease dealing through the wholesale distribution channel altogether.

Partially because of this latter consequence, the Antitrust Division of the Department of Justice has opposed enactment of measures which would have expanded Section 2(a) to compel suppliers to grant lower prices to wholesale customers than to retail customers.[21] The danger of such measures was stated by the Antitrust Division as follows:

> Indeed, enactment of these measures might spur supplier[s] to create an additional link in

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[21] E.g., H.R. 3465, 87th Cong., 1st Sess. (1961); S. 315, 86th Cong., 1st Sess. (1959). These measures were proposed, largely at the instance of wholesale interests, to revise statutory doctrine and overcome judicial decisions sanctioning sales to wholesale and retail customers at the *same* price. See *Bird & Son*, 25 F.T.C. 548, 553 (1957); *Klein* v. *Lionel Corp.*, 138 F. Supp. 560, 565 (D. Del. 1956), *aff'd*, 237 F.2d 13 (3d Cir. 1956). The avowed purpose of the measures—as in the Commission's proposed construction—was to make it possible for wholesalers to obtain prices that would permit them, in turn, to resell to their customers at prices comparative to those paid by direct-buying retailers. Congress rejected the measures and has declined to amend Section 2(a) to so expand the 2(a) definition of "discrimination." See Rowe, 101-103.

> the distribution chain to avoid the bills' application. This would naturally reduce the present function and profit of the wholesaler by forcing him to share it with another distribution class set up between him and the supplier. Again, the supplier may obviate even this measure by cutting off entirely the type of wholesaler or other middleman whose presence in his distribution setup makes for the legal thorn in his side. Thus, these measures might well harm the very distribution middlemen they seek to protect.[22]

The Commission's attempt to construe Section 2(d) as it here urges points up most vividly the dangers inherent in usurping the legislative function under the guise of interpretation. Under any proper analysis, the Commission's construction is clearly unworkable in application and operation and, we believe, incompatible with broader antitrust objectives and philosophy. Inasmuch as Congress did not see fit expressly to require suppliers to deal on equal promotional and advertising terms with functionally distinct customers —although it clearly knew how to do so as evidenced by the language of Section 2(a)—it cannot be assumed that such a construction was intended.

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[22] Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary on Functional Discounts, 86th Cong., 1st Sess. 43 (1959). The FTC took a similar position. E.g., Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary on Functional Discounts, 85th Cong., 2d Sess. 15 (1958), 86th Cong., 1st Sess. 17 (1959).

II. THE PRESENT RECORD PROVIDES NEITHER A PROPER NOR AN ADEQUATE BASIS FOR AN INFORMED RULING ON THE ISSUE PRESENTED

The construction of Section 2(d) here urged by the Commission would quite obviously have far-reaching effects in many segments of our nation's economy. A definitive determination of the issue by this Court, therefore, should be made only after a critical and thorough analysis of all pertinent facts and considerations. This, however, is not possible on the record of this case. The complaint did not raise the issue and, at the time evidence was taken, it appeared established that a 2(d) violation could not be based upon disproportionate promotional payments as between retailers and wholesalers.[23] Under the law at the time of trial, it was thus sufficient, where the alleged discrimination was between wholesale and retail customers, to establish only the fact that the customers involved occupied different functional levels in the distribution system and the matter was at an end. Accordingly, no evidence was adduced by either party going to the propriety of applying Section 2(d) to a "discrimination" between functionally distinct customers.

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[23] The complaint was issued on May 15, 1959 (R. 1-7). On September 9, 1959, while the instant case was in hearings, the Commission, in *Liggett & Myers Tobacco Co., Inc.*, 56 F.T.C. 221, 250-252 (1959), expressly declined to adopt the construction it now proposes. See also *Atalanta Trading Corp.*, 53 F.T.C. 565, 566, 573 (1956), *reversed on other grounds, Atalanta Trading Corp.* v. *Federal Trade Commission*, 258 F.2d 365 (2d Cir. 1958). See also Rowe, *Price Discrimination Under the Robinson-Patman Act*, 394 (1962), stating: "Essentially, while there is some uncertainty as to the precise competitive status of some intermediate distributors as compared with conventional wholesalers or retailers, the supplier must apportion promotional benefits only among distributors which are in geographic *and* functional competition with each other" (emphasis in original).

Some of the many factual and practical considerations relevant to the issue presented are pointed up in the preceding section of this brief. These considerations cannot be assessed in a vacuum; they require an evidentiary exposition of all critical factors in order to arrive at an informed conclusion. We therefore submit that the reasons which prompted this Court to decline to pass upon a *per se* application to vertical territorial limitations in *White Motor Co.* v. *United States,* 372 U.S. 253 (1963), dictates the same approach here. As in *White Motor,* "We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain [of their effect]. . . . We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack . . . any redeeming virtue' . . ." as to warrant classifying them as *per se* violations. *Id.* at 263.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1967

No. 27

FEDERAL TRADE COMMISSION,
Petitioner,

v.

FRED MEYER, INC., *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION AND BRIEF *AMICUS CURIAE* OF ATLANTIC COAST INDEPENDENT DISTRIBUTORS ASSOCIATION, INC.

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MOTION OF ATLANTIC COAST INDEPENDENT DISTRIBUTORS ASSOCIATION, INC. FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Atlantic Coast Independent Distributors Association, Inc. ("ACIDA") respectfully moves for leave to file the annexed brief *amicus curiae* in this case. The Solicitor General, attorney for Petitioner, Federal Trade Commission, has consented to the filing of such a brief. Respondent has refused to do so.

ACIDA is a trade association comprised of approximately 225 independent wholesale distributors of newspapers, periodicals, paperback books and children's books in 21 states in the eastern portion of the United States. ACIDA members sell their wares to stores, schools, supermarkets—anyone who has need for books or the room for a book or magazine rack.

ACIDA members have a vital interest in this case for the resolution of the question on which ceriorari has been

granted is of critical importance to wholesalers and will have ramifications which will reach to the very roots of the periodical and paperback distribution industry. The type of practice now before this Court is a day-to-day occurrence in the distribution of periodicals and paperbacks. The suppliers of the ACIDA member wholesalers (the publishers and their captive national distributors) frequently make direct sales to retail outlets with the two-fold effect of taking business from the wholesalers and creating competition for the customers of the wholesalers. These sales are made in an unfair and discriminatory manner.

ACIDA members thus compete with their suppliers. And the customers of each are in competition. As we will show in our brief, if leave is granted, it is a stacked competition. Wholesalers and their customers are discriminated against while the suppliers hide behind hypertechnical interpretations of the Robinson-Patman Act (15 U.S.C. §§ 13, 13a) which denude it of significance.

ACIDA believes that when viewed from the point of view of the wholesaler—the man in the middle—the Commission's determination in this case was correct and indeed necessary for the survival of all independent wholesalers.

ACIDA respectfully requests leave to be heard.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE ATLANTIC COAST INDEPENDENT DISTRIBUTORS ASSOCIATION, INC. IN SUPPORT OF PETITIONER'S INTERPRETATION OF THE ROBINSON-PATMAN ACT

Statement

This brief *amicus curiae* is submitted on behalf of the Atlantic Coast Independent Distributors Association, Inc. ("ACIDA"), in accordance with Rule 42(3) of the Court's Rules and in support of Petitioner's position.

Interest of the *Amicus Curiae*

ACIDA is a trade association representing more than 225 independent wholesale distributors of newspapers, periodicals, children's books and paperback books (hereinafter

sometimes collectively referred to as periodicals and paperbacks) located in 21 states in the eastern portion of the United States.

The evil present in the case at bar is rampant in the distribution of periodicals and paperbacks. The suppliers of the wholesalers are actively engaged in anti-competitive activities designed to skim-off the cream of the wholesalers' business. Thus, the publishers and national distributors—upon whom wholesalers depend for their product—make direct sales to selected retailers. Naturally, these are the large, high-volume retailers. The publishers and distributors are able to capture this prime business because they resort to discriminatory devices that make it impossible for the wholesalers to compete with them. The same activities also puts the retail customers of the wholesalers at a disadvantage vis a vis the direct buying retailers.

It must be recognized that wholesalers play a crucial role in the chain of distribution. They constitute the primary link with retail establishments and the only link to small retailers, to out of the way retailers and for the non-mass market titles. Where there is no wholesaler, literature simply does not reach the public except for a few fast-moving items sold in mass-volume stores.

Rapid distribution of periodicals and inexpensive paperbacks at multiple and convenient points throughout the United States has been achieved through a four level distribution system: Publisher to national distributor to wholesaler to retailer. It is the deviation from this scheme, and a deviation practiced in an unfair manner, which gives rise to ACIDA's complaints. It is the discriminatory direct sale by the publisher or national distributor to retailers which has created a compelling urgency for protection.

The publisher stands astride the distribution system as its ruling monarch. All of its products are protected

by copyrights; it holds an absolute monopoly and wields absolute power. The good will—or at least the absence of malice—of the publisher is essential if a wholesaler is to remain in business. A wholesaler would be hard put to remain in operation without the business, for example, of Curtis Publishing Company. This giant publishes many magazines including Saturday Evening Post, American Home, Holiday, Jack and Hill and Ladies Home Journal, to name a few. These are the backbone of the magazine business: the popular fast-moving items.

The publishers do not sell directly to wholesalers. Rather, they pass their products on to national distributors. These concerns are, in fact, captive creatures of their publishers. No publisher sells to more than one national distributor.

Thus, Curtis Publishing Company distributes its materials through Curtis Circulation Company. This national distributor not only distributes the entire line of Curtis materials but is the wholesaler's exclusive source for Look, Newsweek, New Yorker, Vogue, Atlantic Monthly, Esquire, Field and Stream, Glamour, Harpers, House and Garden and Mademoiselle, *inter alia*. Curtis Circulation is also the sole distributor of Bantam Books and Wonder Books for children. The latter account for nearly 50% of the sales of children's books. The wrath of this company would mean the destruction of the wholesaler involved. (All franchise agreements between national distributor and wholesaler are claimed by all national distributors to be terminable without cause.)

Select Magazine is another national distributor. It is a joint enterprise of the publishers of Time, Life, Readers Digest and McCalls. It handles those magazines as well as Better Homes and Gardens, Fortune, Popular Science, Redbook, The World Almanac, Sports Illustrated and U. S. News and World Report.

No two national distributors carry the same titles.

Next in the normal chain of distribution come the wholesalers. These are the local businesses that deliver a full line of materials to all takers, wherever located and in whatever quantities they desire, with full return privileges.

The gross volume of wholesalers ranges from less than $100,000 to as much as a few million dollars. The average net profit of the wholesaler, after taxes, has been between less than one percent to 2.55 percent over the past nine years. The profit figures showed a decline in 1966.*

In the main, wholesalers are one-man or family businesses. They are locally owned and operated by men of integrity and achievement in their communities.

In distributing his product to the retailer the wholesaler is required by the publisher (and its captive national distributor) to perform a host of services.**

The wholesaler musts accept publications on an allotment system fixed by the national distributor. The wholesaler must maintain a huge inventory.*** The wholesaler must place the materials on the racks in the stores, he must pick up returns of unsold merchandise and give credit for them and he must make regular checks-ups of the retailers racks. And, of course, he bears the risk of loss and the credit risks.

These requirements, arbitrarily imposed by the publisher and national distributor often bears no economic re-

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* 1966 Income Survey of Wholesalers prepared by Arthur Young & Co.

** Wersay required because the penalty for non-compliance is the loss of the "franchise." Loss of a franchise spells the end of the wholesaler, the destruction of years of work and the rendering valueless of the huge inventory which the wholesaler is required to keep along with his warehouse, trucks, etc.

*** These inventories run from two to ten times monthly sales,

lationship to the business done and frequently make no sense in terms of what is actually needed and required. But this is of no concern to the publishers and national distributors. The expenses do not come out of their pockets.

In spite of all these difficulties, the wholesalers have been able to hang on and even to operate profitably, primarily because they can do a high volume business with supermarkets and large stores in fast moving items. After all it takes very little more time and truck expense and costs very little more money to rack 200 items than to rack 20.

But, the publishers and national distributors are aware of this prime business and attempt to skin-off the cream by making direct sales to these high-volume retailers. They systematically make sales to retailers who are able to give them high volumes in a few fast-moving periodicals and paperbacks. This, of course, circumvents the wholesaler and may deprive him of the fruits of years of effort in building up the outlet concerned.

And what are the terms on which the publishers and national distributors make these direct sales?

On occasion, the price to the direct-buying retailer is lower than that given to the wholesaler. This, of course, is the most obvious form of discrimination and is relatively rare because the publishers and national distributors have taken the time to read this Court's decision in *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948).

But, using a literal reading of *Morton Salt* and without regard to the clear intent of the Robinson-Patman Act (15 U.S.C. §§ 13, 13a), the wholesalers sell to their direct-buying retailers at the same price or a slightly higher price than that at which the wholesalers purchase. Having done this, the publishers and national distributors then say, in all innocence, that they are not discriminating.

This assertion completely ignores the realities. In making the direct sale, the publisher and national distributor furnish a host of services to the retailer. In fact they furnish just about all of the services that the wholesaler normally furnishes to its customers and is required to furnish by his supplier-competitor.

These services are given free of charge to the direct buying retailer. And, of course, they are not given by the publisher or national distributor to the wholesaler or his customers. These unfavored persons must pay for them.

In 1965, the Council for Periodical Distributors Associations (a national organization of wholesalers of which ACIDA is a member) conducted a survey of the impact of direct sales on independent wholesalers. The results are enlightening:

98% of the wholesalers who responded to the questionnaire were faced with direct sales by publishers and national distributors. The survey indicated that such sales were usually at the same price as was charged wholesalers.

73% of those responding said that the publishers had taken established accounts from them by use of direct sales.* In the southeast, wholesalers reported a loss of 20.4% of their accounts because of direct sales between 1955 and 1966. Wholesalers in the mid-Atlantic area showed a loss of 44.3% of their accounts to direct sales in the same period.

And, the wholesalers were almost unanimous in their conclusion that direct sales were made to the cream of the crop; that the best accounts were skimmed off the top, while the smaller and less profitable accounts were left to the wholesalers.

Further, 88% of the wholesalers surveyed stated that they were unable to compete for the business of retail out-

* Thus after years of work to develop a profitable high volume account the wholesaler found himself squeezed out.

lets where the retailers purchased directly. They could not do so simply because they could not meet the price and stay in business.

And, most significantly, 96% of the wholesalers surveyed, responded that in their opinion the survival of independent wholesalers in the publishing industry would be impaired if the current trend toward expansion of discriminatory direct sales should continue unabated.

We believe that these facts speak for themselves.

The Decision of the Federal Trade Commission Recognized the Competitive Realities, Properly Applied the Law, and Was in All Respects Correct.

The Federal Trade Commission handed down what can only be characterized as a landmark decision. It carefully considered the competitive realities and with great perception pierced the technical obstacles hurled at it by the Respondents. The underlying rationale of the Commission's decision was in direct accord with the dominant purpose of the Robinson-Patman Act (15 U.S.C. §§ 13, 13a): to assure equality of treatment for those who do not have the economic power to assure it for themselves.

Wholesalers wield no power over the publishers and national distributors. The small retailer customers of wholesalers wield no power. If might makes right then, and only then, is what is happening in this industry right.

But Congress has determined otherwise. It has determined that fairness is right and its intent ought not be frustrated by the hyper-technical arguments of the Respondent as adopted by the Ninth Circuit.

In its opinion, the Commission noted that the Congressional objective in passing the Robinson-Patman Act (15 U.S.C. §§ 13, 13a) "would be frustrated, of course, if it should be held that promotional allowances accorded to

direct-buying retailers may not be given to wholesalers whose retail customers compete with these favored retailers'' (T65-T66).

In the publishing and distributing industry, the intent of Congress in passing the Robinson-Patman Act (15 U.S.C. §§ 13, 13a) would also be frustrated if the publishers and national distributors are permitted to furnish services, free of charge, to selected direct-buying retailers, and not required to furnish those very same services to the customers of the wholesalers or make a monetary allowance to the wholesalers for the cost of furnishing such services.

We respectfully submit that if a publisher or national distributor furnishes free services to a direct buying retailer, the Robinson-Patman Act (15 U.S.C. §§ 13, 13a) requires, and this Court should hold, that it must also make those services available to the customers of the wholesalers. (Cf. *FTC* v. *Simplicity Patterns, Inc.*, 360 U.S. 55 (1959). True, the retail customer of the wholesaler receives the services. He gets credit, his racks are serviced, his returns are processed. But he pays a dear price in that he must pay more for the material than the direct buying customer of the publisher or national distributor. It is unfair for the publisher and national distributor to assume the role of a wholesaler for a few favored customers and absorb the cost of so doing.

Alternatively, of course, the publishers and national distributors can equalize treatment by making a monetary allowance to the wholesaler for the cost of all these services. A wholesaler purchasing a particular title for 50¢ cannot make it available to his customers for 50¢ and furnish all of the required services; nor can he effectively compete with the publisher and national distributor when they furnish the material in question at 50¢ and throw in all the services gratis. Nor can the wholesaler's customer

who must pay 50¢ plus the wholesalers' cost and small profit compete with the direct-buying retailer who pays only 50¢.

And, of course, service is commutable into price and therefore price and service are interchangeable concepts within the purpose of the Robinson-Patman Act (15 U.S.C. §§ 13, 13a).

F.T.C. v. *Morton Salt Co.*, 334 U.S. 37 (1948) makes it perfectly apparent that the Robinson-Patman Act (15 U.S.C. §§ 13, 13a) will not allow the publishers and national distributors to sell merchandise to direct-buying retailers at a lower price than is granted to the wholesalers.

Yet, in effect, when the publisher or national distributor sells to the wholesaler at a price which may be the same (or even slightly lower) as that to the direct-buying retailer, it is engaging in precisely this form of prohibited discrimination. This occurs because the publisher or national distributor provide the direct buying retailer, at no cost, with all of the services the wholesaler is required to perform and which the wholesalers' customer must buy from the wholesaler. To assert that it is not discriminatory to sell to different levels of distribution at the same price, is to ignore reality. Equality of treatment mandates that the publisher or national distributor furnish to the wholesaler a price concession equivalent to the value of the free services granted to the direct-buying retailer or provide those services to all. The Commission's decision in this case was a first and right step in that direction.

The wholesaler must compete with his own suppliers who have set the ground rules which make competition impossible. The game is, as it were, conducted under rules where the publisher and national distributor are the umpires as well as the competing team. No wonder

the wholesaler and his customers lose every game the publishers and national distributors choose to play.

We respectfully submit that the Commission's decision in *Fred Meyers* was unquestionably correct and is the only realistic approach to the general problems of wholesale distribution and competition to wholesalers from their own suppliers.

CONCLUSION

The decision of the Ninth Circuit should be reversed and that of the Federal Trade Commission reinstated.

Respectfully submitted,

MORRIS B. ABRAM,
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JOSEPH H. EINSTEIN,
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of Counsel,

August 22, 1967.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 27

FEDERAL TRADE COMMISSION,

Petitioner,

v.

FRED MEYER, INC., *et. al.*

Respondents ask the Court to deny our motion on the ground that Section 2(d) of the Robinson-Patman Act permits discrimination relating to promotional allowances which would be barred under Section 2(a) relating to price. Such an interpretation would, of itself, open the door to evasion of the Act. However, leaving this point aside respondents have failed completely to come to grips with the main point of our brief. Namely: Neither Sections 2(a) nor 2(d) can be circumvented by practicing the discrimination against different levels in the distribution system. Respondents have no support whatever for the amazing proposition that Section 2(d) permits discrimination between different levels in the distribution system where it is clear that such discrimination is barred by Section 2(a). See, *FTC* v. *Morton Salt Company,* 334 U.S. 37 (1948).

It therefore makes no difference that the examples drawn from our industry arise under 2(a) or 2(d). The brief filed by ACIDA is clearly apposite to the issue the respondent seeks to avoid, if not confuse.

We respectfully request that the motion for leave to file the brief *amicus curiae* be granted.

Respectfully submitted,

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JOSEPH H. EINSTEIN,
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September 21, 1967

SUPREME COURT OF THE UNITED STATES

No. 27.—October Term, 1967.

Federal Trade Commission, Petitioner, *v.* Fred Meyer, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[March 18, 1968.]

Mr. Chief Justice Warren delivered the opinion of the Court.

The Federal Trade Commission, after extensive proceedings, ruled that respondents, the corporate owner of a chain of supermarkets and two of its officers, had unlawfully induced certain suppliers to engage in discriminatory pricing and sales promotional activities prohibited by §§ 2 (a) and 2 (d) of the Clayton Act, as amended by the Robinson-Patman Act.[1] 63 F. T. C. —— (1963).

[1] 38 Stat. 730, as amended, 49 Stat. 1526, 1527, 15 U. S. C. §§ 13 (a), 13 (d). Section 2 (a) provides in pertinent part:

"[I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be . . . to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . ."

Section 2 (d) provides in full:

"[I]t shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

The Court of Appeals for the Ninth Circuit disagreed with the Commission's construction of § 2 (d) and reversed in part its ruling that the section had been violated. 359 F. 2d 351 (1966). We granted certiorari, 386 U. S. 907 (1967), because the case presents important questions concerning the scope of a key provision of the Robinson-Patman Act.

I.

Section 2 (d) makes it unlawful for a supplier in interstate commerce to grant advertising or other sales promotional allowances to one "customer" who resells the supplier's "products or commodities" unless the allowances are "available on proportionally equal terms to all other customers competing in the distribution of such products or commodities." [2] Although we have limited our review of this case to one aspect of the alleged § 2 (d) violations,[3] full understanding of the issues requires a brief exposition of the facts from which the Commission concluded that respondents had induced violations of both §§ 2 (a) and 2 (d). The relevant facts found by

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[2] See n. 1, *supra*.

[3] The Commission and respondents filed separate petitions for certiorari to review different rulings of the Court of Appeals. Respondents contended (1) that the Commission had failed to show that respondents' inducement of §§ 2 (a) and 2 (d) violations had been knowing and (2) that the Commission's order prohibiting future inducement of § 2 (d) violations was too broad. The Commission's petition raised the question "whether a supplier's granting to a retailer who buys directly from it promotional allowances that are not made available to a wholesaler who resells to retailers competing with the direct-buying retailer violates Section 2 (d) of the Robinson-Patman Act." The Commission also presented an additional question which it sought to reserve only if respondents' petition were granted. We denied respondents' petition, 386 U. S. 908 (1967), and specifically limited our review on the Commission's petition to the issue of statutory interpretation therein presented. 386 U. S. 907 (1967).

the Commission were not disturbed by the Court of Appeals.

Respondent Fred Meyer, Inc., operates a chain of 13 supermarkets in the Portland, Oregon, area which engage in the retail sale of groceries, drugs, variety items, and a limited line of clothing. In 1957 Meyer's sales exceeded $40,000,000. According to its 1960 prospectus, it made one-fourth of the retail food sales in the Portland area and was the second largest seller of all goods in that area. Since 1936 Meyer has conducted annually a four-week promotional campaign in its stores based on the distribution of coupon books to consumers. The books usually contain 72 pages, each page featuring a single product being sold by Meyer at a reduced price. The consumer buys the book for the nominal sum of 10¢ and must surrender the appropriate coupon when making his purchase of goods. A coupon often represents a reduction of one-third or more from Meyer's regular price for the featured item, and the cover of the 1957 book stated that the use of all 72 coupons would result in total savings of more than $54. The promotional campaign is highly successful. Meyer sold 138,700 books in 1957 and 121,270 in 1958. Aside from the nominal 10¢ paid by consumers for the coupon books, Meyer finances the promotion by charging the supplier of each featured product a fee of at least $350 for each coupon-page advertising his product.[4] Some participating suppliers further underwrite the promotion by giving Meyer price reductions on its purchases of featured items, by replacing at no cost a percentage of the goods sold by Meyer during the

[4] The Commission found that the total of $25,200 received by Meyer from 72 participating suppliers in each of the years 1956 and 1957 more than covered Meyer's cost of publishing, distributing, and publicizing the coupon books in those years. The Commission characterized as "clear profit" the $13,870 and $12,127 paid Meyer by consumer purchasers of the books in those years.

campaign, or by redeeming coupons in cash at an agreed rate.

The Commission concluded that this promotional scheme, as conducted in the years 1956 through 1958, violated §§ 2 (d) and 2 (a) in the following respects: First, the $350 paid to Meyer by each of four suppliers participating in the campaigns represented promotional allowances paid in violation of § 2 (d) because similar allowances were not made available on proportionally equal terms to competing customers. Second, the additional value given Meyer by these suppliers in the form of discounts, free replacements of goods sold and coupon redemptions amounted to price discrimination prohibited by § 2 (a).[5] The Commission held that by inducing the suppliers to discriminate in price, respondents had violated § 2 (f) of the Act,[6] and that by inducing them to grant discriminatory promotional allowances, respondents had engaged in an unfair method of competition in violation of § 5 (a) of the Federal Trade Commission Act.[7]

Both before the Commission and in the Court of Appeals, respondents argued that it was not established that two participating suppliers, Tri-Valley Packing

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[5] See n. 1, *supra*.

[6] 15 U. S. C. § 13 (f):

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

[7] 38 Stat. 719, as amended, 66 Stat. 632, 15 U. S. C. § 45 (a):

"(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

. . . . . .

"(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

Association and Idaho Canning Company, had violated § 2 (d). Meyer purchased directly from both of these suppliers. Tri-Valley participated in the 1957 promotion by paying Meyer $350 for a coupon-page featuring Tri-Valley's brand of canned peaches and by replacing in merchandise every third can sold by Meyer on the coupon's offer of three cans for the price of two. Idaho Canning participated in the 1957 promotion on substantially identical terms, except that the coupon-page it purchased offered three cans of corn for the price of two. The Commission found that two wholesalers, Hudson House and Wadhams & Co., both of which resold to Meyer's retail competitors, had been disfavored in these transactions in that Hudson House had purchased canned peaches from Tri-Valley and both Hudson House and Wadhams had purchased canned corn from Idaho Canning, but neither of the two wholesalers had been accorded promotional allowances comparable to those received by Meyer. Respondents argued that, purely as a matter of statutory construction, Tri-Valley and Idaho Canning could not have violated the requirement of proportional equality among "customers competing in the distribution" of their products because (1) Meyer, a retailer, was not "competing" in the distribution of canned corn and peaches with the disfavored wholesalers, Hudson House and Wadhams, and (2) the retailers found by the Commission to be competing with Meyer in the resale of these products were not "customers" of Tri-Valley and Idaho Canning but were customers of Hudson House and Wadhams.

The Commission rejected this reading of § 2 (d), noting that, if respondents' view prevailed, a retailer buying from a wholesaler and having no direct dealings with his supplier would receive no protection against discriminatory promotional allowances given his competitor who purchased directly from the supplier. The Commission

held that § 2 (d) prohibits a supplier from granting promotional allowances to a direct-buying retailer, such as Meyer, unless the allowances are also made available to wholesalers who purchase from the supplier and resell to the direct-buying retailer's competitors. Accordingly, the Commission's cease-and-desist order included a provision barring respondents from inducing suppliers to grant them promotional allowances not available to "customers who resell to purchasers who compete with respondents in the resale of such supplier's products." 63 F. T. C., at —. One Commissioner, while agreeing with the majority that respondents had induced Tri-Valley and Idaho Canning to violate § 2 (d), dissented in part on the ground that the order should have required the promotional allowances to be made available to the retailers competing with Meyer rather than to wholesalers who resold to them.[8] Thus, in his view, the competing retailers were "customers" of Tri-Valley and Idaho Canning within the meaning of the statute. The Court of Appeals adopted the interpretation of § 2 (d) urged by respondents. Consequently, it set aside the portion of the Commission's order set out above.

We agree with the Commission that the proscription of § 2 (d) reaches the kind of discriminatory promotional allowances granted Meyer by Tri-Valley and Idaho Canning. Therefore, we reverse the judgment of the Court of Appeals on this point. However, because we have concluded that Meyer's retail competitors, rather than the two wholesalers, were competing customers under the statute, we also remand the case to the Commission for appropriate modification if its order. We deal first with respondents' arguments, second with the opinion of the Court of Appeals, and third with the Commission's order.

[8] 63 F. T. C., at — (Commissioner Elman, concurring in part and dissenting in part).

II.

Respondents press upon us a view of § 2 (d) which leaves retailers who buy from wholesalers for the most part unprotected from discriminatory promotional allowances granted their direct-buying competitors. We are told that § 2 (d) in specific terms requires this result. To benefit from the statute's requirement of proportional equality, it is urged, a buyer must be a "competing customer" within the narrowest sense of that phrase. Thus, the wholesalers in this case are not competing customers because they do not compete with Meyer, and the retailers who do compete with Meyer in the resale of the suppliers' products are outside the protection of § 2 (d) because they are not customers of the suppliers. For reasons stated below, we agree with respondents that, on the facts of this case, § 2 (d) reaches only discrimination between customers competing for resales at the same functional level and, therefore, does not mandate proportional equality between Meyer and the two wholesalers.[9] But we cannot accept the second half of this argument, for it rests on a narrow definition of "customer" which becomes wholly untenable when viewed in light of the central purpose of § 2 (d) and the economic realities with which its framers were concerned.

Conceding that the Robinson-Patman amendments by no means represent an exemplar of legislative clarity,[10] we cannot, in the absence of an unmistakable directive, construe the Act in a manner which runs counter to the

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[9] This case, in its present posture, does not present the question whether the functional label used by a manufacturer or reseller reflects his actual position in the distributive chain. Compare *FTC* v. *Ruberoid Company*, 343 U. S. 470, 475 (1952); cf. *FTC* v. *Simplicity Pattern Co.*, 360 U. S. 55, 62–63 (1959).

[10] *Automatic Canteen Co.* v. *FTC*, 346 U. S. 61, 65 (1953); see F. Rowe, Price Discrimination Under the Robinson-Patman Act 20 (1962).

broad goals which Congress intended it to effectuate. See, *e. g.*, *FTC* v. *Sun Oil Co.*, 371 U. S. 505, 516–521 (1963); *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F. 2d 988, 991–993 (C. A. 8th Cir.), cert. denied, 326 U. S. 773 (1945). We start with the proposition that "[t]he Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained preferences over smaller ones by virtue of their greater purchasing power." *FTC* v. *Henry Broch & Co.*, 363 U. S. 166, 168 (1960). The role within the statutory scheme which Congress intended for § 2 (d) is well documented in the legislative history. An investigation of chain store buying practices undertaken by the Federal Trade Commission, at Congress' request,[11] had indicated that § 2 of the Clayton Act was an inadequate deterrent against outright price discrimination.[12] The investigation also revealed that certain practices by which large buyers induced concessions which their smaller competitors could not obtain were wholly beyond the reach of § 2.[13] It is significant that congressional concern had focused on the buying practices of large retailers, particularly the chain stores, because it was felt that they were threatening the continued existence of the independent merchant.[14] Indeed, before Congress acted,

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[11] S. Res. No. 224, 70th Cong., 1st Sess., 69 Cong. Rec. 7857 (1928).

[12] Federal Trade Commission, Final Report on the Chain Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess., 63–65, 90–91, 96–97 (1935).

[13] *Id.*, at 57–66. See also Hearings Before the Special House Committee on Investigation of American Retail Federation, 74th Cong., 1st Sess. (1935).

[14] See C. Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act 6–11 (2d rev'd ed. 1959). In presenting his bill to the House Judiciary Committee, Representative Patman stated:

"I believe it is the opinion of everyone who has studied this subject, that the day of the independent merchant is gone unless

some States had attempted to limit the growth of retail chains through express prohibitions against further extensions and through taxation.[15] One of the practices disclosed by the Commission's investigation was that by which large retailers induced concessions from suppliers in the form of advertising and other sales promotional allowances.[16] The draftsman of the provision which eventually emerged as § 2 (d) explained that, even when such payments were made for actual sales promotional services, they were a form of indirect price discrimination because the recipient of the allowances could shift part of his advertising costs to his supplier while his disfavored competitor could not.[17] That Congress adopted this view of the practice it sought to eliminate by § 2 (d) is demonstrated by the words used by the Senate Judiciary Committee in recommending enactment of the section:

> "Still another favored medium for the granting of oppressive discriminations is found in the practice of large buyer customers to demand, and of their

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something is done and done quickly. He cannot possibly survive under that system. So we have reached the crossroads; we must either turn the food and grocery business of this . . . country over to a few corporate chains, or we have got to pass laws that will give the people, who built this country in time of peace and saved it in time of war, an opportunity to exist—not to give them any special rights, special privileges, or special benefits, but just to deny their competitors the special benefits that they are getting, that they should not be permitted to have." Hearings on H. R. 8442, 4495, and 5062 Before the House Committee on the Judiciary, 74th Cong., 1st Sess., 6–7 (1935).

[15] See Federal Trade Commission, Final Report on the Chain Store Investigation, *supra*, n. 12, at 78–82.

[16] *Id.*, at 44–46, 61. See also Hearings Before the Special House Committee on Investigation of American Retail Federation, 74th Cong., 1st Sess., Vol. 3, No. 1, at 66–88 (1935).

[17] Hearings on Bills to Amend the Clayton Act Before a Subcommittee of the House Committee on the Judiciary, 74th Cong., 2d Sess., 464 (1936) (Mr. Teegarden).

> sellers to grant, special allowances in purported payment of advertising and other sales promotional services, which the customer agrees to render with respect to the seller's products, or sometimes with reference to his business generally. Such an allowance becomes unjust when the service is not rendered as agreed and paid for, or when, if rendered, the payment is grossly in excess of its value, or when in any case the customer is deriving from it equal benefit to his own business and is thus enabled to shift to his vendor substantial portions of his own advertising cost, while his smaller competitor, unable to command such allowances, cannot do so." [18]

Congress chose to deter such indirect price discrimination by prohibiting the granting of sales promotional allowances to one customer unless accorded on proportionally equal terms to all competing customers.

Of course, neither the Committee Report nor other parts of the legislative history in so many words defines "customer" to include retailers who purchase through wholesalers and compete with direct buyers in resales. But a narrower reading of § 2 (d) would lead to the following anomalous result. On the one hand, direct-buying retailers like Meyer, who resell large quantities of their suppliers' products and therefore find it feasible to undertake the traditional wholesaling functions for themselves, would be protected by the provision from the granting of discriminatory promotional allowances to their direct-buying competitors. On the other hand, smaller retailers whose only access to suppliers is through independent wholesalers would not be entitled to this protection. Such a result would be diametrically op-

[18] S. Rep. No. 1502, 74th Cong., 2d Sess., 7 (1936). The House Judiciary Committee reported the provision favorably in identical terms. H. R. Rep. No. 2287, 74th Cong., 2d Sess., 15–16 (1936).

posed to Congress' clearly stated intent to improve the competitive position of small retailers by eliminating what was regarded as an abusive form of discrimination. If we were to read "customer" as excluding retailers who buy through wholesalers and compete with direct buyers, we would frustrate the purpose of § 2 (d). We effectuate it by holding that the section includes such competing retailers within the protected class.

III.

The Commission did not press in the Court of Appeals the position of one Commissioner that retailers who purchased through Hudson House and Wadhams and competed with Meyer in resales were customers of Tri-Valley and Idaho Canning. Consequently, that court gave almost no consideration to the construction of § 2 (d) which we hold to be the proper one. Citing its prior ruling in *Tri-Valley Packing Assn.* v. *FTC*, 329 F. 2d 694, 709–710 (C. A. 9th Cir. 1964), the court merely stated that a § 2 (d) violation could not be made out unless (1) Tri-Valley and Idaho Canning had in some way dealt directly with retailers competing with Meyer, and (2) canned peaches and corn sold by the two suppliers could be traced through Hudson House and Wadhams to the shelves of the competing retailers. 359 F. 2d, at 359–360, 362–363. In the view of the Court of Appeals, these two requirements comprise the elements of the "indirect customer" doctrine under which the Commission and the courts impose § 2 (d) liability when a supplier in effect supplants his intermediate distributors in dealings with those to whom the distributors resell and favors some the distributors' accounts over others. See *American News Co.* v. *FTC*, 300 F. 2d 104, 109 (C. A. 2d Cir.), cert. denied, 371 U. S. 824 (1962); *K. S. Corp.* v. *Chemstrand Corp.*, 198 F. Supp. 310, 312–313 (D. C.

S. D. N. Y. 1961); *Kay Windsor Frocks, Inc.*, 51 F. T. C. 89, 95–96 (1954); F. Rowe, Price Discrimination Under the Robinson-Patman Act 398–399 (1962, Supp. 1964). We need not and do not question the validity of this doctrine as applied to pierce a supplier's unrealistic claim that a reseller favored by him is actually the customer of an intermediate distributor. Nor do we reach the question whether a retailer may succeed in a private action based on § 2 (d) without proving that he in fact resold the supplier's product in competition with a favored buyer. In the case before us, it is conceded that Meyer was a customer of Tri-Valley and Idaho Canning. Moreover, as indicated by its approval of the Commission's § 2 (a) ruling, the Court of Appeals did not question the Commission's finding that Meyer competed in the resale of Tri-Valley and Idaho Canning products with retailers who purchased through Hudson House and Wadhams.[19] Given these findings, it was unnecessary for the Commission to resort to the indirect customer doctrine. Whether suppliers deal directly with disfavored competitors or not, they can, and here did, afford a direct buyer the kind of competitive advantage which § 2 (d) was intended to eliminate. In light of our holding that "customer" in § 2 (d) includes retailers who buy through wholesalers and compete with a direct buyer in the resale of the supplier's product, the requirement of direct dealing between the supplier and disfavored competitors imposed by the Court of Appeals rests on too narrow a reading of the statute. Further, in light of the Commission's finding that Meyer competed in the resale of

[19] The Commission's § 2 (a) and § 2 (d) rulings were both based on findings that retailers in the Portland area who purchased through Hudson House and Wadhams competed with Meyer in the resale of Idaho Canning corn and Tri-Valley peaches. The Court of Appeals could not have consistently set aside these findings with regard to the § 2 (d) violations while upholding them with respect to § 2 (a).

the Idaho Canning and Tri-Valley products with other retailers in the area who purchased through Hudson House and Wadhams and in light of the fact that the Court of Appeals did not disturb this finding, the court misapprehended the Commission's burden in requiring it to trace those products to the shelves of the disfavored retailers.

IV.

The Commission's view of the impact of respondents' argument in no way conflicts with our own. In rejecting respondents' construction of § 2 (d), the Commission observed:

> "The net result of this argument is that the entire structure of 'independent' food merchants—including the traditional wholesaler and his numerous, small retailer-customers—are placed completely outside the pale of Section 2 of the Amended Clayton Act insofar as their competition with direct-buying 'chains' is concerned.
>
> . . . . . .
>
> "We are not persuaded that Congress either intended or effected any such result when it passed § 2 (d). In the first place, such a construction goes squarely against the well-know purposes of the Act itself, namely, to give 'independent' food sellers an even break in their competition with the 'chains.' " [20]

But rather than concluding, as we have, that retailers who purchased through Hudson House and Wadhams and competed with Meyer in resales were disfavored customers of Tri-Valley and Idaho Canning, a majority of the Commission held that the wholesalers, Hudson House and Wadhams, were the customers entitled to promotional allowances on proportionally equal terms with

[20] 63 F. T. C., at —.

Meyer. Although we approach the Commission's ruling with the deference due the agency charged with day-to-day administration of the Act, we hold that, at least on the facts before us, § 2 (d) does not require proportional equality between Meyer and the two wholesalers.

The Commission believed it found support for its position in the language of § 2 (d) itself, which requires that promotional allowances be accorded on proportionally equal terms to "customers competing in the *distribution*" of a supplier's product, rather than merely to customers competing in resales. The majority reasoned that Hudson House and Wadhams, when they resold to Meyer's retail competitors, were competing with Meyer in the distribution of Tri-Valley and Idaho Canning products because the two wholesalers were "seeking exactly the same consumer dollars that respondents are after." 63 F. T. C., at —. While it cannot be doubted that Congress reasonably could have employed such a broad concept of competition in § 2 (d), we do not believe that the use of the word "distribution" rather than "resale" is a clear indication that it did, and what discussion there was of the promotional allowance provision during the congressional hearings indicates that the section was meant to impose proportional equality only where buyers competed on the same functional level. Thus, in reporting the provision, both the Senate and House Judiciary Committee used the following example:

> "To illustrate: Where, as was revealed in the hearings earlier referred to in this report, a manufacturer grants a particular chain distributor an advertising allowance of a stated amount per month per store in which the former's goods are sold, a competing customer with a smaller number of stores, but equally able to furnish the same service per store, and under conditions of the same value to the seller,

would be entitled to a similar allowance on that basis." [21]

This illustration and others which could be cited are not conclusive, but they do strongly suggest that the competition with which Congress was concerned in § 2 (d) was that between buyers who competed in resales of the supplier's products. And, as stated above, Congress' objective was to assure that all sellers, regardless of size, competing directly for the same customers would receive even-handed treatment from their suppliers.[22] We noted in *FTC* v. *Sun Oil Co.*, 371 U. S. 505 (1963), that when Congress wished to expand the meaning of competition to include more than resellers operating on the same functional level, it knew how to do so in unmistakable terms. It did so in § 2 (a) of the Act by prohibiting price discrimination which may "injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." *Id.*, at 514–515; see *FTC* v. *Morton Salt Co.*, 334 U. S. 37, 55 (1948). We stated in *Sun Oil* that:

> "There is no reason appearing on the face of the statute to assume that Congress intended to invoke by omission in § 2 (b) the same broad meaning of competition or competitor which it explicitly provided by inclusion in § 2 (a); the reasonable inference is quite the contrary." [23]

In the present case, too, we think "the reasonable inference" is that Congress did not intend such a broad meaning of competition in § 2 (d). We recognize that it would be both inappropriate and unwise to attempt

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[21] S. Rep. No. 1502, 74th Cong., 2d Sess., 8 (1936); H. R. Rep. No. 2287, 74th Cong., 2d Sess., 16 (1936).

[22] See n. 14, *supra*.

[23] 371 U. S., at 515.

to formulate an all-embracing rule applying the elusive language of the section to every system of distribution a supplier might devise for getting his product to the consumer. But, on the concrete facts here presented, it is clear that the direct impact of Meyer's receiving discriminatory promotional allowances is felt by the disfavored retailers with whom Meyer competes in resales. We cannot assume without a clear indication from Congress that § 2 (d) was intended to compel the supplier to pay the allowances to a reseller further up the distributive chain who might or might not pass them on to the level where the impact would be felt directly. We conclude that the most reasonable construction of § 2 (d) is one which places on the supplier the responsibility for making promotional allowances available to those resellers who compete directly with the favored buyer.

The Commission argues here that the view we take of § 2 (d) is impracticable because supplies will not always find it feasible to bypass their wholesalers and grant promotional allowance directly to their numerous retail outlets. Our decision does not necessitate such bypassing. We hold only that, when a supplier gives allowances to a direct-buying retailer, he must also make them available on comparable terms to those who buy his products through wholesalers and compete with the direct buyer in resales. Nothing we have said bars a supplier, consistently with other provisions of the antitrust laws, from utilizing his wholesalers to distribute payments or administer a promotional program, so long as the supplier takes responsibility, under rules and guides promulgated by the Commission for the regulation of such practices,[24] for seeing that the allowances are

[24] See 16 C. F. R. §§ 1.55–1.56; cf. "Guides for Advertising Allowances and Other Merchandising Payments and Services," 1 CCH Trade Reg. Rep. 6073–6079.

made available to all who compete in the resale of his product.

The judgment of the Court of Appeals, insofar as it held that the promotional allowances granted Meyer by Tri-Valley and Idaho Canning did not violate § 2 (d), is reversed. The case is remanded to the Commission for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 27.—October Term, 1967.

Federal Trade Commission, Petitioner, v. Fred Meyer, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[March 18, 1968.]

Mr. Justice Fortas, concurring.

I agree with the result in this case and I join the Court's opinion. The net of our decision, as I see it, is this. The statute permits a supplier to make payment to retailers for services and facilities only if such payment or its equivalent is made available to all competing retailers handling the supplier's product. If they choose to render the same or equivalent service or furnish the same or equivalent facilities, they are entitled to the same payment.* I believe that this result, obviously intended by the Congress, can best be squared with the language of § 2 (d) by the device of regarding the wholesaler and his retail customer as a unit for purposes of that section. The Court is clearly correct in my view in requiring that the opportunity to participate be afforded to the competing retailer, and not merely to the wholesaler. This is the clear thrust and purpose of the section. The supplier may satisfy this obligation by direct dealing with the competing retailer or by arrangement with the wholesaler reasonably designed to transmit to the retailer participation in the program if the retailer chooses to accept.

*We need not here consider refinements of the problem—*e. g.*, the duty of the supplier to tailor his offer so that it is within the practical capability of all competing retailers; or negatively, to avoid making an offer which does not permit fair participation by all types of retailers of the product, as a practical matter.

SUPREME COURT OF THE UNITED STATES

No. 27.—October Term, 1967.

Federal Trade Commission, Petitioner, *v.* Fred Meyer, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[March 18, 1968.]

Mr. Justice Harlan, dissenting.

I dissent because I believe the time has come for a change in approach to Robinson-Patman Act cases that, as here, can only be decided by a judicial *tour de force*. No doubt, the broad purpose of the Act was to protect small sellers from the advantages their larger competitors can obtain through greater buying power. In implementing this purpose, however, the statute imposes a hodgepodge of confusing,[1] inconsistent,[2] and frequently misdirected[3] restrictions. In such a situation it seems

[1] See, *e. g.*, Rowe, Price Discrimination Under the Robinson-Patman Act 534; Stedman, Twenty-four Years of the Robinson-Patman Act, 1960 Wis. L. Rev. 197, 218.

[2] See, *e. g.*, Levi, The Robinson-Patman Act—Is It in the Public Interest? 1 ABA Antitrust Section 60 (1952–1954). As Professor Levi noted, published criticism of the Act is unsportingly easy to find: "the literature on the Act has become something of a contest of witticisms to relieve an otherwise dreary picture." *Ibid.* An example is *Anonymous*, Eine Kleine Juristische Schlummergeschichte, 79 Harv. L. Rev. 921.

[3] See, *e. g.*, Shniderman, The Impact of the Robinson-Patman Act on Pricing Flexibility, 57 Nw. U. L. Rev. 173; Austern, Presumption & Percipience About Competitive Effect Under Section 2 of the Clayton Act, 81 Harv. L. Rev. 773. The confusion is all the more unfortunate in a field where actual conflicting objectives are many: "competitive" purposes are often at odds with "protective" purposes; the defense of traders at one level of distribution may be inconsistent with the liberty of traders at another level, and with the interests of consumers.

to me the wiser course for this Court to hew as closely as possible to the wandering line that the statute has drawn (with due deference to the expertise of the Commission charged with enforcing the statute) and not to read into the Act its own notions of how best to protect "little people" from "big people."

In this case, certain suppliers made promotional allowances to respondent, a direct-buying retailer. The Act provides that if promotional allowances are made to one customer they must also be made, on a basis of proportional equality, to all other "customers competing in the distribution" of the supplier's product. The suppliers here involved did not make the promotional allowances given to respondent available to certain retailers who compete with respondent but who buy not from the suppliers themselves but from wholesalers who in turn buy from the suppliers. The Court now holds, for the first time, 32 years after the passage of the Act, that although these disfavored retailers are not literally "customers" of the suppliers, the "broad goals" of the Act require them to be treated as if they were.

Unfortunately, nothing in the Act and not one word of legislative history the Court has found suggests that Congress meant the word "customers" to mean "non-customers whom the Court thinks need protection." The Federal Trade Commission refused to accept the suggestion of one Commissioner that this unexpected nonliteral reading of the word would best effectuate the Act's purposes, so that Commission expertise cannot in this instance be brought to bear in support of the Court's construction.

Furthermore, the failure of the Act to extend explicit protection in the present situation cannot be dismissed as mere legislative oversight. Compelling suppliers to make promotional allowances available to retailers with whom they do not deal is no simple matter. The sup-

plier could deal through his wholesalers, imposing restrictions on them to guarantee that an "allowance" is actually passed through to retailers, only by running afoul of the Sherman Act.[4] Nor would it simplify matters to make the allowances directly available to retailers: by hypothesis, the retailers in question are too small to make direct dealing efficient, and in any event the suppliers and retailers would constantly risk a Sherman Act charge, by the wholesaler in the middle, that they were conspiring in restraint of him.[5]

In addition, under the present circumstances the very idea of "proportional equality" is almost meaningless. The supplier is asked to offer "equal" promotional allowances to a direct-buying chain and a set of small retailers who buy through wholesalers who presumably carry much of the promotion load; the supplier risks treble damages if his guess as to what is even-handed treatment turns out to be erroneous. Even if it were desirable to force suppliers to submit every promotion to the FTC for advance approval, the Commission's refusal to require equality between customers and noncustomers here does not indicate that the experts are sanguine about the possibility of working our a rational definition of proportional equality under these circumstances.

The supplier can, of course, resolutely refuse to enter into promotional programs, a course of action that would effectively avoid favoring large distributors. In doing so, however, he would be abandoning one significant

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[4] Under *Albrecht* v. *Herald Co.*, — U. S. —, it would presumably be unlawful *per se* for a supplier to attempt to prevent his wholesalers from absorbing the allowance by charging higher prices.

[5] Under *Albrecht, supra,* n. 5, it is difficult to see why an agreement between supplier and retailer sufficient to insure that wholesalers in the middle do not absorb promotional allowances would not constitute a combination in restraint of these wholesalers.

form of competition with his fellow suppliers, and would risk the disfavor of retailers who might prevail on differently situated and less timorous competitive suppliers for assistance.

Congress, concerned as it was for small retailers, did not explicitly impose the particular restriction on suppliers announced today. Since, for all we know, the omission may have been deliberate in light of practical considerations, I prefer to take the statute as we find it. This course of action here and in similarly opaque cases might at least encourage the Congress to give this notoriously amorphous statute the thorough overhauling that has long been due.[6] On this basis I consider that this case should go for the respondent.

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[6] See Friendly, The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't, 63 Col. L. Rev. 787, 794: "The tiniest fraction of the time spent by lawyers, legal writers, administrators, and judges in an unsuccessful endeavor to elucidate the obscurities of this statute would have sufficed to put the house in order once the problems were revealed; but that time has not been spent."

SUPREME COURT OF THE UNITED STATES

No. 27.—October Term, 1967.

Federal Trade Commission, Petitioner, *v.* Fred Meyer, Inc., et al.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[March 18, 1968.]

Mr. Justice Stewart, dissenting.

Section 2 (d) of the Robinson-Patman Act makes it unlawful for a supplier to grant to a customer a promotional allowance which is not available to "all other customers competing in the distribution of such products or commodities." The Federal Trade Commission held that the respondent retailer had violated § 2 (d) by inducing certain of its direct suppliers to grant it promotional allowances which were not available to wholesalers who sold the suppliers' products to retailers competing with the respondent. The Court of Appeals refused to enforce this part of the Commission's order on the ground that the wholesalers were not customers "competing" with respondent. We granted certiorari limited to a single question:

> "Whether a supplier's granting to a retailer who buys directly from it promotional allowances that are not made available to a wholesaler who resells to retailers competing with the direct-buying retailer violates Section 2 (d) of the Robinson-Patman Act." 386 U. S. 907.

The Court today agrees with the Court of Appeals' answer to this question and holds that wholesalers are not customers "competing" with the respondent. But the Court nevertheless goes on to hold that § 2 (d) was violated upon a theory not argued here by either party.

The theory is that retailers who are in fact customers of independent wholesalers are somehow also "customers" of the suppliers of those wholesalers. The Commission has never suggested that this case should turn on any such construction of the term "customer." * Cf. *SEC* v. *Chenery Corp.*, 318 U. S. 80.

Because the Court of Appeals was correct in rejecting the Commission's construction of § 2 (d), I would affirm its judgment. But, at the very least, the case should be remanded in order to give the respondent notice and an opportunity to defend against the novel construction of § 2 (d) under which the Court today finds the respondent to be a violator of the law. Due process requires no less. Cf. *Cole* v. *Arkansas*, 333 U. S. 196.

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*One Commissioner attempted in vain to persuade the Commission to accept the theory which the Court today adopts: "What made this practice illegal, as I see it, is that the allowances were not also made available on proportionally equal terms to Meyer's retail competitors. But that is not the Commission's view of the law." 63 F. T. C., at — (Commissioner Elman, concurring in part and dissenting in part).